FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/18UB/LSC/2023/0065
Property	:	18 Otter Mill, Tumbling Weir Way, Ottery St Mary, EX11 1GT 3 Corn Mill, Mill Street, Ottery St Mary, EX11 1AF
Applicant	:	Kelly Newland (1) Jason Hobday (2)
Representative	:	None
Respondent	:	Churchill Property Group (South West) Limited (1) Otter Mill Management Company Limited (2)
Representative	:	Chris de Beneducci of counsel instructed directly by Paul Conway
Type of Application	:	Applications to determine service charges– section 27A Landlord and Tenant Act 1985 Applications that costs not be recoverable as charges- section 20C Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002
Tribunal Member(s)	:	Judge J Dobson Mr B Bourne MRICS Mr E Shaylor MCIEH
Date and venue of hearing	:	6th and 7th June and 1st July 2024
Date of Decision	:	11th October 2024

DECISION

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Summary of the Decision

1. **In respect of insurance:**

   for 2021 to 2022, the Insurance Rent payable by the 1st Applicant is £304.48 and by the 2nd Applicant is £187.55;
   for July 2022 to June 2023, the Insurance Rent payable by the Applicants is £513.96;
   for July 2023 to at least December 2023, there is no Insurance Rent payable by the Applicants as no further policy was taken out during that period of the Service Charge Year.

2. **In respect of service charges:**

   no Service Charges (as defined) as demanded- so actual for 2021- 2022 and estimated for July 2022 to end of December 2023 are payable by either Applicant.

3. **The Tribunal grants in part the Applicants' applications pursuant to section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of the Commonhold and Leasehold Reform Act 2002 such that in the event that the Respondents would otherwise be entitled to recover any legal costs of the proceedings as service charges or administration charges only 1/3 of the Respondents' costs may be so recovered.**

4. **The Respondent shall pay to the Applicant £300 in respect of the fees paid for the application within 14 days of issue of this Decision.**

Introduction

5. It is important to be clear that this is a Decision. Its purpose is therefore to set out any relevant background and law, to record any findings of fact and identify the way in which the applicable has been applied to those facts. It then set out determinations made.

6. This Decision is not a record of the oral hearing or recital of all of the written arguments and evidence before the Tribunal. Not only is that not its purpose, but if it sought to do those things, the document would be an extremely long one- even more so by some distance than it actually is- and its purpose in providing the basis for the Tribunal's decision would almost certainly be obscured, not enhanced. The Decision therefore sets out only those matters received which were relevant to and assisted in the making of the decisions which the Tribunal needed to make in order to determine the issues in this case which required a determination to be in order to provide the Decision on the application and which explain why a party won or lost on any relevant matter.

7. This Decision therefore seeks to focus solely on the key issues. The omission to refer to or make findings about every statement or document mentioned is not a tacit acknowledgement of the accuracy or truth of statements made or documents received, nor it is to be taken to suggest those have not been considered and taken account of. Many of the various matters mentioned in the bundle or at the hearing do not require any finding or determination to be made for the purpose of deciding the relevant issues in these applications and, given the number of matters raised, inevitably in producing a readable Decision it has not been practicable to specifically refer to them. The Decision is made based on the evidence and arguments the parties presented, save where clarified by the Tribunal in the hearing, and is necessarily limited by the matters to which the Tribunal was referred. Even then, this Decision is firmly towards the long end of any scale.

8. There has been a rather greater delay in this Decision being produced than the usual and longer than the target date, principally in consequence of a combination absences during the summer period and other hearing commitments since. It is only appropriate to sincerely apologise to the parties for the delay since then and for any frustration and inconvenience arising. The Tribunal does so.

9. The Decision can perhaps be summarised in these terms. The Applicants have demonstrated that some of the Insurance Rent is not payable- but not all. The Service Charges demanded are- for various reasons- not payable. Although it has been possible to make the determinations required of the Tribunal, the Tribunal can only be thankful that it is not within its jurisdiction to have to determine the actual financial position of each Applicant as against the Respondents both prior to this Decision and after applying this Decision.

<u>The Background</u>

10. The Applicants are the lessees of Flats 18 Otter Mill, Tumbling Weir Way, Ottery St Mary, EX11 1GT and 3 Corn Mill, Mill Street, Ottery St Mary, EX11 1AF respectively. Both form part of the Otter Mill and Corn Mill development ("the Development"). The 1st Applicant became the lessee of Flat 18 Otter Mill (plot 18) on 7th December 2021 and the 2nd Applicant became the lessee of Flat 3 Corn Mill (plot 26) on 8th April 2022.

11. The 1st Respondent is a special purpose vehicle incorporated as far back as 2003 to hold the Property and was the freehold owner of the Development. The two shares in R1 are both owned by Greenside Properties Limited "Greenside"), of which Mr Paul Conway, the name used by him, is the sole owner (his name on Companies House is given as Damien Paul Conway and that was the name given in the application form [9]). He is also the sole director of the 1st Respondent. In addition, he was, until the changes set out below, the sole director and member of the 2nd Respondent.

12. The 2nd Respondent is now the freeholder. It became so on 12th December 2023 when the freehold interest in the Development was conveyed to it by

the 1st Respondent (or more accurately on whatever date the transfer was registered by HM Land Registry but in any event, it had the relevant rights from then). That had been provided to happen within a reasonable time of the grant of the last of the leases of a flat in the Development. It was said that Mr Conway resigned as a director of the 2nd Respondent and ceased to be a member on 18th December 2023. The members of the 2nd Respondent are now the lessees of the dwellings within the Development and certain of them are also now the directors of the company.

13. The 1st Respondent had developed the listed mill buildings and created a number of flats and three houses. Planning permission had been granted in 2014. There are now twenty- two flats within Otter Mill and four in Corn Mill. In addition, there are eight commercial units to the ground floor of Otter Mill- seven of those are let to Greenside and one to a resident. Of the twenty- two flats in Otter Mill, twelve are accessed via an atrium.

14. The first residential lease was entered into on 25th June 2021, which had relevance as the start date for service charges, and the flats all sold over the next few months, with the last being completed on 20th April 2022. That first residential lease followed a Full Final Certificate dated 21st May 2021 and issued by Assent Building Control (Assent"), who were independent building inspectors. A home warranty insurance policy was placed by the 1st Respondent on behalf of each lessee purchaser [e.g., 686- 687] prior to the demise, described as a "Castle 10" policy and with Checkmate as originally known, now QuestGates, following the Certificate issued.

15. However, it is common ground that the construction work on the Development was not complete as at 21st May 2021, indeed by some distance. That is demonstrated, amongst other ways, by photographs [2- 3 as being the most contemporaneous although supported by the subsequent pages]. On 5th May 2023, Assent emailed [579] the 1st Respondent stating the Full Final Certificate had been issued in error and that it had been the intention "to issue only a Partial Final Certificate covering specific areas and elements of work". On 12th June 2023, it then issued a new "Initial Notice" [189- 190] in place of the earlier notices. Subsequently, in Autumn 2023, Contravention Notices were issued [673- 684].

16. It has been said on behalf of the Applicants that, at least as at March 2024, there were issues with the quality of construction, fire safety and flood concerns. By way of example, a point made by the Applicants was that Assent had said in March 2024 that they had lost faith in the 1st Respondent undertaking the necessary work and the 1st Respondent said that was against a background of it having indicated that it may claim against Assent. That was therefore a very contentious matter but save as identified as relevant below, those sorts of issues were matters which the Tribunal considers fall outside of its jurisdiction (unless there were what would otherwise be recoverable service charges which were not recoverable because, for example, the costs incurred addressed defects in construction and the Lease did not permit recovery by such charges).

17. The 1st Respondent initially managed the Development itself but then appointed managing agents on 1st July 2022, being Eaton Terry Clark. They continued until the lessees became the members and shareholders of the 2nd Respondent. The 2nd Respondent did not in practice take any steps prior to December 2023.

18. A service charge budget was prepared for a period from June 2021 until June 2022 and then for the subsequent twelve months by the agents- hence from 1st July 2022 to end of June 2023. It was not wholly clear on the 2021 budget document itself as to the exact period of the first budget- which states June 2021 rather than, for example, 1st June 2021 or perhaps 25th June 2021 when there was first a lessee who could pay service charges. In addition, plainly if the budget covered June 2022, then it would only be for a single year if it commenced on 1st July 2021. However, the parties did not raise any point and so the Tribunal treats the budget as being for the period June 2021 onwards and for a service charge year ending on 30th June 2022 notwithstanding that is not an exact year.

19. The Applicants are liable to pay percentages of the cost of insurance as Insurance Rent and of Service Costs by way of their Service Charges. The amount in dispute for each Applicant is the sum of the charges to them individually of insurance and service charges, not the amount of the insurance and Service Costs payable by lessees as a whole. It is consequently significantly less than the figures in the application suggest.

<u>The Application and history of the case prior to the hearing</u>

20. The Applicant sought determination of service charges for their flats within the Property for the period June 2021 to June 2022 by application dated 9th May 2023 [7- 20] pursuant to section 27A of the Landlord and Tenant Act 1985 ("the Act"). That application was expanded to cover two further service charge years to 2024 [22- 24] and explained further in a statement of case [40- 56]. The costs incurred which resulted in the service charges challenged were said to be £91,303.99, of which £49,994.64 comprised the cost of insurance premiums. The applications identified those figures as the service charges in dispute, but they were not. Rather they were the cost of the insurance and the service costs, such that the service charges in dispute were the portions of those figures payable by the particular Applicants, which differed between the Applicants because of the different buildings in which their flats were situated. The application identified three elements, insurance costs from December 2020 to December 2023, service charges from June 2021 to June 2022 when the 1st Respondent was manging the Development and from 1st July 2022 to 12th December 2023 when the management was delegated to the managing agent. Amongst the themes were whether the insurance for the Property was fit for purpose, that grounds maintenance was of poor quality and that work from the development remained unfinished, for example doors and fire alarms.

21. The Applicants also made an application [14] for an order under section 20C of the Act that the costs of the proceedings should not be recoverable by the Applicant as service charges and an application pursuant to

paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for an order that the liability to pay an administration charge in respect of contractual litigation costs be reduced or extinguished.

22. Whilst the Applicants provided a list of lessees, there was no authority from them stating that they wished to become applicants in these proceedings or providing authority for the Applicants to represent them in that. It is for that reason that the service costs incurred were only relevant to the extent of the Applicants' shares of those.

23. Directions were given on 16th October 2023 [25] listing a case management hearing and at that hearing [25-31]. Following that hearing, additional Directions were made [32- 39] dealing with provision of documents. Further Directions were subsequently made on 27th February 2024 [25-31]. The Directions recorded that "was agreed the issues for determination are whether demands have been issued compliant with the terms of the lease, including as to apportionment of charges to leaseholders. Further whether or not the costs themselves were reasonable". Directions identified the relevant service charge years to be 1st January 2021 to 31st December 2021, 1st January 2022 to 31st December 2022 and 1st January 2023 to 31st December 2023, although the Tribunal has determined those are not the relevant periods in fact.

24. It should be recorded that engagement in case management hearings and in the case as a whole was by the 1st Respondent. The 2nd Respondent took no active part at any time. Although reference is made below to the Respondents plural from time to time, that reflects the control of both being essentially the same and in principle there being matters which were the responsibility of one or other, to an extent the 1st Respondent in default of the 2nd Respondent. However, in practice the 2nd Respondent was dormant until December 2023. Nothing is affected by any distinction.

25. The Directions provided for the Applicant to produce a bundle of documents relied on by the parties in relation to the issues for determination. The Applicant produced a PDF bundle amounting to 760 pages in advance of the final hearing excluding photographs provided in a separate photograph bundle of 43 pages. The bundles include budgets for the costs estimated as likely to be incurred from June 2021 and for later periods and summaries of what was said to be actual income and expenditure [586 and 641]. The bundle also includes many pages of detailed emails containing queries and responses.

26. Whilst the Tribunal makes it clear that it has read the document bundle, the Tribunal does not refer to all of the documents in detail in this Decision, it being impractical and unnecessary to do so. Where the Tribunal does not refer to pages or documents in this Decision, it should not be mistakenly assumed that the Tribunal has ignored or left them out of account. Insofar as the Tribunal does refer to specific pages from the bundle, the Tribunal does so by numbers in square brackets [ ], and with reference to PDF bundle page- numbering. Where the Tribunal in a similar

manner refers to pages of the separate photograph bundle, it does so by number in square brackets prefixed by “P” [P].

The Lease

27. The lease (“the Lease”) of Flat 18, Otter Mill was provided [134- 185]. It is dated 7th December 2021 and was tripartite, being made between the 1st Respondent, the 2nd Respondent and then the 1st Applicant plus Gregory Frederick Mason, who played no part in these proceedings. The term of the Lease is 999 years commencing on 1st January 2021. The Tribunal understands that the lease of Flat 3, Corn Mill is in the same or substantively the same terms. The Applicant lessee is referred to in the Lease as “the Tenant”. The 2nd Respondent is said to have agreed “to join in this Lease and undertake obligations for the services repair maintenance insurance and management of the Building and the Common Parts” and is the Management Company.

28. The parties set out provisions of the Lease in some detail and the Tribunal adopts the same approach where the provisions are relevant.

29. The “Flats” generally are defined as “any premises forming part of the Building that are capable of being let and occupied as a single private dwelling (except the Property and the Retained Parts)” and Flat 18 is defined. There is a definition of the “Building” which, in this Lease, means Otter Mil as opposed to the Development as a whole. The definitions of “Common Parts” and “Retained Parts” contain nothing unusual.

30. Various “Services” to be provided by the Applicant are set out in Part 1 of Schedule 7 and indeed it is those items which are defined “Services” pursuant to the Lease. Those are in the terms which would be expected, including cleaning, maintaining decorating, repairing and replacing elements of the Development, which includes for example cleaning the outside of window and maintaining any landscaped and grassed areas.

31. The “Service Costs” are the costs of providing the services and are set out in Part 2 of Schedule 7 as:

> “1.1. all of the costs reasonably and properly incurred or reasonably and properly estimated by the Landlord to be incurred of:
>
> 1.1.2 providing the Services;
>
> 1.1.2 the supply and removal of electricity, gas, water, sewage and other utilities to and from the Retained Parts;
>
> 1.1.3 complying with the recommendations and requirements of the insurers of the Building (insofar as those recommendations and requirements relate to the Retained Parts);
>
> 1.1.4 complying with all laws relating to the Retained Parts, their use and any works carried out at them, and relating to any materials kept at or disposed of from the Common Parts;
>
> ....
>
> 1.1.6 putting aside such sum as shall reasonably be considered necessary by the Landlord (whose decision shall be final as to questions of fact) to provide reserves or sinking funds for items of future expenditure to be

or expected to be incurred at any time in connection with providing the Services; and”

32. Paragraph 1.2 adds the costs of managing agents “for the carrying out and provision of the Services” or, “where managing agents are not employed, a management fee for the same”; accountants “employed by the Landlord to prepare and audit the service charge accounts” and others retained.

33. In respect of such costs it is said “(but which for the avoidance of doubt as they attach to the Property shall include costs in respect of the lift)”.

34. The “Services” as listed do not include insuring the Development. The “Service Costs” listed do not include the cost of insurance.

35. The 1st Respondent covenants pursuant to clause 7.1.3 to perform the “Landlord’s Covenants”. Schedule 6 sets out “Landlord Covenants. The matters to which the Respondents must attend include notably the following and so include insurance:

“**2 Insurance**

2.1 To effect and maintain insurance of the Building against loss or damage caused by any of the Insured Risks with reputable insurers, on fair and reasonable terms that represent value for money, for an amount not less than the Reinstatement Value subject to:

2.1.1 any exclusions, limitations, conditions or excesses that may be imposed by the insurer; and
2.1.2 insurance being available on reasonable terms in the London insurance market

2.2 To serve on the Tenant a notice giving full particulars of the gross cost of the insurance premium payable in respect of the Building (after any discount or commission but including IPT) Such notice shall state:

2.2.1 the date by which the gross premium is payable to the insurers; and
2.2.2 the Insurance Rent payable by the Tenant, how it has been calculated and the date on which it is payable.

2.3 In relation to any insurance effected by the Landlord under this clause, the Landlord shall:
2.3.1 at the request of the Tenant supply the Tenant with:
(a) a copy of the insurance policy and schedule; and
(b) a copy of the receipt for the current year's premium.
2.3.2 notify the Tenant of any change in the scope, level or terms of cover as soon as reasonably practicable after the Landlord has become aware of the change;

....

4 Services and service costs

4.1 Subject to the Tenant paying the Service Charge, to provide the Services.

4.2 Before or as soon as possible after the start of each Service Charge Year, the Landlord shall prepare and send the Tenant an estimate of the Service Costs for that Service Charge Year and a statement of the estimated Service Charge for that Service Charge Year.

4.3 As soon as reasonably practicable after the end of each Service Charge Year, the Landlord shall prepare and send to the Tenant a certificate showing the Service Costs and the Service Charge for that Service Charge Year.

4.4 To keep accounts, records and receipts relating to the Service Costs incurred by the Landlord and to permit the Tenant, on giving reasonable notice, to inspect the accounts, records and receipts by appointment with the Landlord (or its accountants or managing agents).

4.5 If any cost is omitted from the calculation of the Service Charge in any Service Charge Year, the Landlord shall be entitled to include it in the estimate and certificate of the Service Charge in any following Service Charge Year. Otherwise, and except in the case of manifest error, the Service Charge certificate shall be conclusive as to all matters of fact to which it refers."

36. That wording in respect of insurance is a little unusual in its requirement for the terms to "represent value for money" specifically. The insured risks are the usual ones and include flood.

37. The service charge accounting year ("Service Charge Year") is defined in clause 1.1 of the Lease as follows:

"Service Charge Year means the annual accounting period relating to the Services and the Service Costs beginning on 1 January and each subsequent year during the Term provided that the Landlord may from time to time (but not more than once in any calendar year) change the date on which the annual accounting period starts and shall give written notice of that change to the Tenant as soon as reasonably practicable;"

38. It will be identified that an accounting period beginning on 1st January does not accord with the period of the budgets and also that the lessees took over as members and directors of the 2nd Respondent just before the end of a service charge year as defined in the Lease, subject to alteration of that.

39. The 2nd Respondent, the Management Company as defined in the Lease, also covenants pursuant to clause 6.1 of the Lease. It does so in the following terms:

"................... the Management Company covenants with the Landlord and the Tenant to observe and perform on behalf of the Landlord the obligations on the Landlord set out in clause 10, paragraph 2, paragraph 3 and paragraph 4 of Schedule 6" – i.e., those obligations relating to insuring the Building, rebuilding the Building following damage or destruction, and providing the Services"

40. It is said that those obligations shall apply as follows:

"to the Management Company to the same extent as they apply to the Landlord, and the Management Company may, in carrying out its obligations under these provisions, exercise on behalf of the Landlord the rights granted to the Landlord under these provisions"

41. In addition:

"the Landlord's liability to the Tenant shall not be affected by the Management Company's covenant contained in this clause 6.1".

42. The 2nd Respondent is required to provide various documents to the 1st Respondent in relation to the service costs and there are various other provisions.

43. The date for payment of "Rent", which is defined such as to include the contribution to the cost of insurance – "Insurance Rent". Insurance Rent as is defined as follows:

"(a) the Tenant's Proportion of the cost of any premiums (including any IPT) that the Landlord or the Management Company (as appropriate) expends (after any discount or commission is allowed or paid to the Landlord), and any fees and other expenses that the Landlord or the Management Company reasonably incurs, in effecting and maintaining insurance of the Building and the Common Parts in accordance in with the obligations contained in this Lease including any professional fees for carrying out any insurance valuation of the Reinstatement Value;"

44. "Service Charges" are defined as "the Tenant's Proportion of the Service Costs".

45. That Proportion is provided in Schedule 9 to the Lease to be 3.85% of most of the identified elements of the Service Costs, including the costs related to lifts, although there are differences between the shares payable by each of the Applicants in relation to some elements, reflecting the fact that one flat is within Otter Mill and the other within the rather smaller Corn Mill. Schedule 9 is in fact the service charge budget for 2021. There are various notes within the document about how sums and shares have been arrived at. The 1st Applicant is required to pay 4.55% (100% divided by 22) of the cost of "Main Building Roof", i.e. the roof of Otter Mill, and 8.33% (100% divided by 12) of "Atrium cleaning and lighting", being the atrium to Otter Mill. She must also pay 8.33% of the annual cost of "Lift Checks" according to the budgets produced.

46. The budget indicates that the 2nd Applicant makes no contribution to those elements, the Tribunal understands because of his flat not being situated in that building. Instead, he must contribute 25% of the cost for the roof at Corn Mill. The 2nd Applicant is required, the Lease indicates, to pay for the costs of the lifts themselves, albeit not the annual lift checks.

47. Pursuant to clause 5 of the Lease, the lessee covenants with both the First Respondent and with the Second Respondent to observe and perform "the

Tenant Covenants". Schedule 4 to the Lease sets out those Tenant Covenants. Those include the following at paragraphs 2 and 3:

"2 Service Charge

2.1 The Tenant shall pay to the Landlord or the Management Company (as appropriate) the estimated Service Charge for each Service Charge Year on the Rent Payment Date [i.e., 1 January] in each year.

....

2.3 If, in respect of any Service Charge Year, the estimate of the Service Charge provided by the Landlord or the Management Company is less than the Service Charge, the Tenant shall pay the difference on demand. If, in respect of any Service Charge Year, the estimate provided by the Landlord or the Management Company of the Service Charge is more than the Service Charge, the Landlord or Management Company (as appropriate) shall credit the difference against the Tenant's next instalment of the estimated Service Charge (and where the difference exceeds the next instalment then the balance of the difference shall be credited against each succeeding instalment until it is fully credited).

....

3 Insurance

3.1 To pay to the Landlord or the Management Company (as appropriate):

3.1.1 the Insurance Rent demanded by the Landlord or the Management Company by the date specified in the notice given by the Landlord or the Management Company under the terms of this Lease".

48. The service charge mechanism, as commonly termed, including payment of the estimated Service Charge for the given year and payment on demand of the balance where the actual Service Charge exceeds the estimate is standard. It will be noted that the 1st Respondent must provide a certificate of actual charges for the given Service Charge Year as soon as practicable, which will identify any balance due or sum to be credited. References are to the Respondent sending an estimate of the Service Charge for the Service Charge year and to the "Tenant" paying that on the payment date.

49. The Tribunal was not, it is identified for completeness, in possession of any of the commercial leases. The Applicants said in their Skeleton Argument that a lease has been granted of one and then a separate lease was granted to a connected company of the remainder. It was also said that very little contribution to costs was required to be made pursuant to those leases. However, the Tribunal does not identify that as relevant to the sums payable by the residential lessees in this instance and could say little about such commercial leases even if it wished to in the absence of sight of the, or the parties having agreed and set out the provisions.

50. It is worth making clear that in the remainder of the Decision, the Tribunal adopts the terms (including above) used in the Lease and as used in the Lease, for example Insurance Rent, Service Costs and Service Charge.

Hence, whilst the contribution to the cost of insurance would in the normal course form part of the service charges, it does not do in this Decision in order to make clear the distinction between the cost of the insurance and Insurance Rent on the one hand and Service Costs and Service Charges for the other items on the other hand.

The Construction of Leases

51. It is well- established law that the Leases are to be construed applying the basic principles of construction of such leases, and where the construction of a lease is not different from the construction of another contractual document, as set out by the Supreme Court in *Arnold v Britton* [2015] UKSC 36 in the judgment of Lord Neuberger (paragraph 15):

"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

52. Context is therefore very important, although it is not everything. Lord Neuberger went on to emphasise (paragraph 17):

"the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in *Chartbrook* [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most likely to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language that they use in a contract. And again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision."

The relevant Law

53. Essentially, pursuant to sections 18 and 27A of the Act, the Tribunal has the power to decide about all aspects of liability to pay variable residential (but not commercial) service charges and can interpret the Lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a lessee to a lessor for the costs of services, repairs, maintenance or insurance and the lessor's costs of management, under the terms of the Lease.

54. The Tribunal has jurisdiction where the whole or part of the service charges varies or may vary according to the relevant costs incurred.

55. The Tribunal can decide by whom, to whom, how much, when and how a service charge is payable. Section 19 provides that service costs shall only be taken account of insofar as reasonably incurred and the services and works to which they relate are of a reasonable standard. The amount payable is limited to the sum relevant to those reasonable costs.

56. The Applicants specifically referred to section 30A and Schedule to the Act in respect of insurance. Those include a number of rights for lessees, including the right to be given a summary of the cover and the right to inspect the policy.

57. The Tribunal takes into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993 and effective from 1 June 2016. The Code contains a number of provisions relating to variable service charges and their collection. It gives advice and directions to all landlords and their managing agents of residential leasehold property as to their duties.

58. The Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009 states: "Failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings, the codes of practice shall be admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account."

59. Section 21B subsections (1) to (4) require that a service charge demand is accompanied by a summary of tenant's rights and obligations. Section 47 requires that a demand must contain the name and address of the landlord. Service charges are not payable unless the demand complied with those matters and until a demand is served which does so.

60. There are innumerable case authorities in respect of several and varied aspects of service charge disputes. Many have no direct relevance to this dispute and need not be mentioned.

61. Mr de Benducci referred in respect of the relevant determination generally to the judgment of the Upper Tribunal in *Bradley & anor v. Abacus Land 4 Limited* [2024] UKUT 120 (LC) as follows:

> "It is sometimes said that the jurisdiction [under s.27A of the 1975 Act] is to determine the "reasonableness and payability" of service charges, but that is inaccurate as well as inelegant. The jurisdiction is to decide whether a service charge is payable. It might not be payable because, for example, it falls foul of section 19 of the 1985 Act because the cost was not reasonably incurred, or the work or services provided were not of a reasonable standard. Another reason why a service charge might not be payable is because it is not one that the landlord is entitled by the lease to charge, and that is what is said in these proceedings".

62. The Tribunal accepts that, noting that references to service charges being reasonable in decisions tend to refer to the cost not being reasonably incurred or a lack of a reasonable standard and identifying the appropriate sum in light of those but also that the phrase quoted in the previous paragraph is both often used and also imperfect.

63. Examples of potentially relevant authorities for the purpose of this Decision and the key points arising from them are set out below:

Forcelux v Sweetman [2001] 2 EGLR 173

There are two elements to the answer to the question of whether the cost of any given service charge item is reasonably incurred, namely:
i. Was the decision-making process in keeping with the terms of the lease and reasonable applying the Act; and
ii. Is the sum to be charged reasonable as opposed to excessive as compared to the market norm in light of the evidence?
The second element was stated to be particularly important.

(The Applicants specifically cited this case and so did Mr Beneducci.)

Lord Mayor and Citizens of Westminster v Fleury and Others [2010] UKUT 136 (LT)

The first element principally involves a consideration of whether the proposed method is a reasonable one in all the circumstances, even if other reasonable decisions could have been made. However, that is not a complete answer to the question and other evidence should be considered.

The London Borough of Hounslow v Waaler [2017] EWCA Civ 45

The process is relevant but to be tested against the outcome. The fact that the costs of the work will be borne by the lessees is part of the context to whether the costs have been or will be reasonably incurred and interests of the lessees must be conscientiously considered and given the weight due, although they are not determinative- the lessees have no veto and are not entitled to insist on the cheapest possible means of fulfilling the landlord's objective. Reasonableness is to be determined applying an objective test.

As Mr De Benducci submitted, the landlord is also entitled to take its own interests into account.

Schilling v Canary Riverside Development PTE Limited [2005] EW Lands LRX 65 2005

The initial or legal burden lies on the party bringing a claim and a case must be raised sufficient for the other party to be required to meet it. A lessee's challenge to the reasonableness of a service charge (or administration charge) must be based on some evidence that the charge is unreasonable. The lessee cannot simply ask the lessor to prove sums to be

payable. That does not mean that the burden of proof is on the applicant throughout. Rather the lessee must produce some evidence of unreasonableness before the lessor can be required to prove reasonableness. Once a prima facie case has been raised the burden of proof switches to the other party to show why there is a defence to the claim or application. If that respondent succeeds in that, the burden can then change back onto the claimant to show why that defence is not valid.

London Borough of Havering v Macdonald [2012] UKUT 154 (LC) Walden-Smith J at paragraph 28

Once a tenant establishes a prima facie case by identifying the item of expenditure complained of and the general nature (but not the evidence) of the case it will be for the landlord to establish the reasonableness of the charge. There is no presumption for or against the reasonableness of the standard or of the costs as regards service charges and the decision will be made on all the evidence made available.

64. Mr De Benducci also relied in his Skeleton Argument on an additional case authority not mentioned above, being that of *Cos Services Limited v. Nicholson & Willans* [2017] UKUT 382 (LC). He said that in overview, the Tribunal must adopt a two-stage test and consider both process (in terms of the rationality of the landlord's decision-making) and outcome (in terms of the reasonableness, in all the circumstances, of the sum being charged). The Tribunal accepts that to be sufficient summary for these purposes, the net effect being somewhat similar to that from *Forcelux*.

65. The Applicants in their Skeleton Argument reminded the Tribunal of the judgment in *Berrycroft Management Co v Sinclair Gardens Investments* [1996] EGCS 143, CA the Court of Appeal confirmed that an insurance premium will satisfy the statutory reasonableness test if procured at arm's length in the market in the normal course of management even if they are not the cheapest. They also referred to *COS* with regard to the judgment of the Upper Tribunal that the *Forcelux* test should however also apply in addition to the *Berrycroft* test - such that the Tribunal should also consider the landlord's process in selecting the insurance in addition to the level of the premium and whether it was procured at arm's length in the market in the normal course of management.

66. The Applicants in their Skeleton Argument Mr De Beneducci also specifically quoted from the Tanfield Chambers book, Service Charges and Management (5th ed., 2021) at 5-05, as follows:

"There is no implied obligation that the landlord has to shop around and secure the cheapest cover or insure at the rates, in respect of which the tenants have obtained quotes. Provided the cover in place is obtained in the usual course of business and from a reputable insurer the landlord will have complied with its obligation and the cost of the cover will be recoverable".

67. That is not of course legal authority, although the book is perhaps the leading text, and certainly the most commonly cited in respect of its

subject matter. The Tribunal also accepts that the statement of the law made is an accurate reflection of the case authorities mentioned above.

68. The Applicants further relied on caselaw identifying that managing agents' fees are as able as other service costs to be reduced when determining the service charges payable where the standard of service was poor.

69. Whilst the parties did not address the point, it is important to identify that considerations are not entirely the same for estimated service charges as they are for actual service charges. It necessarily follows in terms of estimated charges that the actual cost is only known later and usually at the end of the service charge year, whereas the estimate is provided at the start. Case authorities recognise that when considering the amount of estimated charges, the Tribunal can only assess the reasonableness of any sums based on what the landlord knew at the time of providing the estimate.

70. The authority of *Wigmore Homes (UK) Ltd v Spembly Works Residents Association Ltd* [2018] UKUT 252 (LC) (and there are also various others) explains that it is for a landlord to demonstrate the reasonableness of any estimate on which the on- account demands are based where that is in dispute. However, the question is whether those demands were reasonable in the circumstances which existed at that date and hence consideration has to be directed to the position at that time and not to matters arising later.

71. It will be appreciated that some of the above authorities are ones cited by the parties and some are not. However, to the extent that the parties did not refer to certain of the authorities, the Tribunal considers that they are well- established and uncontroversial authorities and that it is very unlikely that the parties could have made any submissions about them which would have had any impact on the outcome of this application. Hence the Tribunal did not consider it necessary to seek any specific additional submissions.

The Inspection

72. The inspection took place on the morning of 6th June commencing at 10am. The two Applicants, Mr Paul Conway of the 1st Respondent and Mr Chris De Beneducci, counsel for the 1st Respondent were present.

73. The Tribunal viewed the elements of the Development which it was shown. The Tribunal did not undertake a survey of the Property, either in respect of specific areas or generally. The Tribunal explained that the purpose of the inspection was to view the Development and that it would inspect anything a party wished it to, but it did not wish to hear about any aspect of the case and would take evidence at the hearing later.

74. The principle building on the Property was Otter Mill. That is a former mill building as the name suggests constructed in brick, on five storeys and with regular windows of the style which might be expected of an old mill.

Otter Mill comprises commercial units to the ground floor and apartments to the upper floors. To the right- hand side when viewed from the road and with the river to the rear of the buildings, separated by a paved area, was situated Corn Mill and attached to that was smaller building comprising a freehold house. Set back a little but still between Corn Mill and Otter was another building, not directly relevant, which had been converted into two attached houses, each with a small rear courtyard.

75. To the left of the Property was an estate of new houses, which the Tribunal understands were built by a different developer. There was a road which led from the main road to the left of Otter Mill- and separated from that building by another paved area- from which a left turn lead into the development of houses. It was also possible to turn right into parking spaces serving the Property, both alongside Otter Mill, but separated by the paved area, and behind Otter Mill across the rear of the Property. Along the side of Otter Mill, within the paved area and a few feet from the wall of the building was a gulley drain.

76. As indicated above, behind the buildings- and behind the parking spaces to the rear of the buildings- the River Otter flowed. There was a retaining wall seen by the Tribunal between the rear of the Property and the river. There appeared to have been a path to the river side of the wall- of which some remained. The wall was raised to 5 feet approximately above the height of the path. However, the rest of the path had collapsed and some temporary metal fencing was in place. To the far side of the river and between the loop the approximate bottom of which was by the retaining wall, were fields (without flood protection). The Tribunal looked at the flow of the river, which it seemed to the Tribunal could hit the path and, if conditions caused it, the retaining wall but The Tribunal claims no specialist expertise in that (and no specific evidence was later presented).

77. Although nothing turned on it, for completeness the Tribunal identifies that further to the left and to the side of Corn Mill, there was the unusual feature of the tumbling weir which gave the access road its name, including a channel in which water flowed down into the River Otter. That was interesting in itself although of no consequence to the outcome.

78. The Tribunal entered the atrium of Otter Mill. The Tribunal was able to see the staircase, windows and lift to the atrium. The Tribunal noted in relation to the staircase that some of the treads had been "made good" due to some imperfect joints. The staircase was wooden. There were some plastic spacers below some stairs and it was apparent that the parties differed as to the reason for those. It also noted the apparent challenges presented to cleaning the inside of the windows to the upper floors. The Tribunal also saw the separate entrance adjacent to Mill Street (the main road), described as the "listed building entrance", from which six flats are accessed. As the name suggests, this was a feature of the original building. Another staircase led up from that. It was not apparent that the two staircases connected and so other than the lift, there was only one means of egress from each set of flats.

79. Four duplex flats in Otter Mill were identified as accessed directly from outside the building but the Tribunal did not enter those. The Tribunal also accessed the communal store, which contained 10 bicycle racks, although the majority of space was taken up by large refuse bins, recycling boxes and food waste caddies. There was also one occupied commercial unit seen.

80. The Tribunal also entered the limited communal areas of Corn Mill, seeing the hallway and staircase and the position of the windows in the communal area but not the flats themselves.

The Hearing

81. The hearing was conducted at Yeovil County and Magistrates Court in person for the first two days and remotely by video with the Tribunal members sitting at Havant Justice Centre for the third.

82. The hearing venue was not particularly convenient as compared to the location of the Property and the travel from the inspection to the hearing venue took some while, including because of traffic delays due to roadworks**.** It was not until approximately 12.30pm on the first day that the hearing was able to commence.

83. Ms Newland and Mr Hobday represented themselves effectively in combination- the majority of the advocacy was undertaken by Mr Hobday but various matters were dealt with by Ms Newland. The Respondent was represented by Mr De Beneducci of counsel throughout.

84. Mr De Beneducci provided a Skeleton Argument of some twenty pages in length. The Applicants provide a Skeleton Argument of some twenty- eight pages. As for whether either can truly be described a Skeleton Argument given their significant length, not least given the relatively modest sums demanded of the Applicants and requiring determination is at best doubtful. Nevertheless, the Tribunal considered them. Both sides had also provided statements of case [40-56 (Applicants) and 58- 61 (Respondents).

85. It merits identifying that the Applicants' Skeleton Argument also raises certain questions which the Tribunal considers falls outside the scope of the application as made, or indeed out of its jurisdiction more generally, namely, whether commercial units in the building should contribute to the service costs and costs of insurance, and if so, in what proportion, and whether the Respondent breached the lease? The Tribunal does not therefore comment in this Decision on any of those matters.

86. The Applicant also raised another question of "Whether the Respondent has breached Section 42 Landlord and Tenant Act 1987?" That is to say that one or more funds shall be held in trust by the landlord. However, that had not been raised in the application itself. It was not directly relevant to the Service Costs or cost of insurance, although it was to the Service charges and Insurance Rent amounts insofar as the extent to which the 1st Respondent could identify how much any given lessee had paid, how much

of that was due for estimated or actual service charges and how much more should properly be demanded in any given year to meet the Service Costas and cost of insurance. Insofar as that necessarily forms part and parcel of consideration of the payable Service Charges or Insurance Rent

87. The Tribunal received written witness evidence from eight witnesses for the Applicants, being the 1st Applicant Ms Newland [62-91] and seven other lessees. Those were of Lloyd Robinson [92-100], John Dabin [101-104], Caroline Pomeroy [105-107], Julia Harris [108-110], Lynne Reid [111-114], Bridie Moxon [115-117] and Annalisa Dingle [118-120]. There was no witness statement from the 2nd Applicant, Mr Hobday.

88. The Tribunal also received written witness evidence from four witnesses for the Respondent, including from Mr Paul Conway [121-130], but also Mark Manell [131], Dave Strawbridge [132] and Chrispian Humphreys [133]. There was no evidence from Mr Gary Conway, the son of Paul Conway, although there was much mention of him in writing and orally.

89. The Tribunal does not set out matters referred to in those statements here.

90. Oral evidence was given by Ms Newland and on behalf of the Applicants by Lloyd Robinson, Caroline Pomeroy and John Dabin for the Applicants.

91. It is not necessary to describe in detail here the full content of their evidence, as much of it lent support to the general arguments discussed in detail later in this Decision. Most was given in response to cross examination by Mr De Beneducci. However, in brief summary, the evidence was as follows. Mr Robinson, a structural engineer, spoke about how his expectations with regard to the general site management during and after the construction phase were not met, and his belief that the insurance policy was for an unoccupied building and / or that leaseholders should not pay for an uplifted premium due to higher risks during the construction phase. Ms Pomeroy said when she moved in (August 2021) she was asked to sign a risk waiver as the staircase was not complete and access to her flat was via scaffolding; she also described her distress that plumbing was not connected and she had to use a toilet in another flat; she generally said cleaning, window cleaning and grounds maintenance during 2021/22 should not be paid for by leaseholders as there was construction in progress. Mr Dabin, a retired firefighter, resides in Corn Mill and described a lack of cleaning until April 2022, no fire alarm testing until early 2023, fire log- books not filled in, a lack of refuse facilities and generally poor provision of services.

92. Oral evidence was given by Mr Paul Conway on behalf of the Respondents, principally under cross- examination by Ms Newland, although also in response to questions by the Tribunal about various matters which had been raised. He gave evidence particularly about the development and his experience and how work was distinguished between that and work chargeable as service charges plus how contractors for services were dealt with, although that involved estimates and extrapolation; he said that he did not find the final certificate odd because the building was structurally

sound and he asserted fire safety compliant; evidence was given about the sale to Ms Pomeroy when the work was ongoing and Mr Conway said she wished to complete to avoid losing her mortgage offer; he maintained that the budgets were realistic; reference was made to the timing of informing the brokers of the lack of a final certificate; other measures had been put in place rather than flood boards and the flood defence erosion had been reported to the insurer; there were five fire risk assessments over the period, it was said that Assent had revise their requirements.

93. No other witnesses were called by the Respondent to give oral evidence.

94. The Applicants were prepared to agree the written statements of Mark Mannell, Dave Strawbridge, and Chrispian Humphreys who did not attend on behalf of the 1st Respondent insofar as the statements went.

95. The Tribunal considered that little weight should be given to the written evidence of those witnesses. The same applied to the written evidence of Ms Harris and Ms Dingle. The witnesses' evidence could not be tested and there was nothing in the reason for non- attendance which might have suggested that it should be treated any more generously than usual where a witness did not attend. The written evidence was of little evidential value.

96. It was identified by the Tribunal that insofar as the Applicants were expressed to seek compensation of £13,000.00 for what was asserted to be the "Difference in Policy Premiums obtained due to the lack of Building Control Certificate", the Tribunal had no power to award that and so any merits or otherwise were irrelevant.

97. That oral witness evidence was predominantly taken on 6th and 7th June 2024. On the morning of the second day, Mr De Beneducci sought to rely on an additional email which had become relevant due to matters raised the previous day. The Tribunal permitted the 1st Respondent to rely upon that. The Applicants were permitted to rely on a Flood Risk Assessment from 2012 which they wished to in response to that email.

98. As explained in Directions dated 12th June 2024 ("the June Directions"), it was not possible to complete the case on those dates. Consequently, it was necessary to fix a further hearing date. Somewhat unfortunately from a listing perspective, Mr De Beneducci was unavailable for effectively three weeks and hence the delay before receiving closing submissions and concluding the hearing was rather greater than would normally be aimed for and the timing rather closer to the holiday period than had been intended. There was no solution to that.

99. As also explained in the same Directions, a query also arose in the hearing, amongst several, as to the fact that there were indicated to be final service charge accounts for one or more period, although it is unclear those accorded with the service charge year as provided for in the Lease. The Applicants had indeed also made that point [49]. In any event, no finalised accounts for any given year or period were apparent in the bundle. The Tribunal directed that the parties ensure that "any final accounts prepared

including service charges for the above service charge years are provided to the Tribunal by 5pm 14th June 2024. The Applicants shall ensure that is attended to insofar as such accounts are in their possession in the absence of the Respondent having specifically done so".

100. The Directions gave the parties up to one hour each for closing submissions, leaving aside any clarification sought by the Tribunal.

101. The Tribunal subsequently received by email from Mr Paul Conway an email dated 11th June 2024. That attached an email dated 12th April 2023 and sent to Mr Dabin, together with the attachments to that email. That was said to be an example of an email sent to all lessees and which was contained in the bundle [496]. Notably the attachment was what Mr Conway described in his email to the Tribunal as the actual costs.

102. Ms Newland provided a fourteen-page written response to the Directions, which has not been requested. However, on balance the Tribunal determined that it would consider the document. Notably, that identified that the Respondent submitted a document entitled 'Income & Expenditure to June 2022' for the period June 2021 to June 2022 [641] but that the figures are different to those in a separate document titled 'Total Income & Expenditure Summary - June 2021 - 2022' [586] and also that the document sent to Mr Dabin setting out expenditure for the same period gave figures which again differed. She additionally identified documents sent in January 2023 and April 2023 to Mr Dabin containing different figures. Rather obviously that produced uncertainty as to which of the figures was correct, although it was not indicated by any party that any figures other than those which it was not disputed had been sent to the lessees had ever been stated to the lessees to constitute the actual figures in substitution of those sent to, for example, Mr Dabin.

103. Ms Newland also identified invoices sent to Mr Dabin in 2023 in respect of service charges during the period 1st January 2022 to 30th June 2022, so for the second half of the service charge year as revised, there being three such documents [716, 746 and another] with different figures. It matters not directly of course about documents sent to Mr Dabin about sums which may be payable by Mr Dabin, given that he is not an Applicant, but the Tribunal infers that documents were sent to each.

104. **The Applicants additionally made a further case management hearing dated 27th June 2024 to adduce an additional document by way of evidence. That was an email trail involving the Building Control department of East Devon District Council said to relate to non- compliance and safety issues at the Development. It was said that the reason for seeking to produce the document was because of asserted impact on the credibility of Mr Conway. The 1st Respondent provided a response by Mr Conway, which also provided some other documents including a response to the Council about any need for additional fire safety measures.**

105. An issue also arose as to the inter-relation of the service charge years provided for in the Lease- that is to say 1st January to 31st December- and the other periods which had in practice been adopted by the Respondent. At that point, it was difficult to discern the sums of service charges under any given element during any given service charge year provided for in the Lease. However, in the event, the Tribunal has determined that point does not have the significance it was thought it might do and for the reasons explained below. In the event, some of the time at the hearing devoted to challenging what it was established were budget figures but on the basis of actual work undertaken and services provided or not as the case may be and on the quality of those was not especially helpful to the Tribunal when dealing with those estimated service charges.

106. The Tribunal heard closing submissions on 1st July in the morning, the part of the hearing dealt with remotely, from Mr De Beneducci and then the Applicants. The Tribunal utilised the afternoon to consider its decision on the several matters requiring determination.

107. The Tribunal is grateful to all the above for their assistance with these applications.

Consideration of the Disputed Service Charge Issues

108. The Tribunal does not set out the parties' cases in advance of discussion of the issues which it considers relevant in reaching the determinations made. The Tribunal then refers to only the parts of the parties' cases of substantive impact on its consideration of the matters below.

109. The Tribunal takes wider arguments and matters about service charges and insurance first. It then turns to matters specific year by year. The Tribunal does identify separately within each year the matters related to insurance and the matters related to service charge items. The Tribunal accepts that the general and specific matters have not been divided perfectly and the general part does include some matters more particular to one year than another.

General Arguments and matters

Service Charges

110. The Tribunal noted that the completion certificate issued far before the development was completed enabled the dwellings to be sold and they were. The Tribunal did not receive sufficient evidence to be able to identify exactly how the issue of that certificate came about and strictly it matters not for these purposes. Nevertheless, as a matter of simple fact the development was far from complete and remained a construction site. Further, it must have been entirely obvious to the 1st Respondent that the Development was not complete. Leaving aside the condition of the Development, the 1st Respondent was still undertaking works of significance and certainly far beyond work which might reasonably be

called snagging and hence could hardly fail to recognise that it had not finished the construction works.

111. Likewise, the lessees purchasing in Spring 2021 and for some months beyond that must have been aware that the Development was not complete, and it is apparent were not put off by that. The Tribunal received evidence, for example, about a lack of any proper staircase in the atrium to Otter Mill and lack of water turned and completed plumbing on at the time of the purchase of her lease by Ms Pomeroy in August 2021 [106] (and orally). Whilst it is understandable on one level that the lessees may have been unhappy with the Development being incomplete at the time of their purchase, the Tribunal finds as a fact that they were not misled and did not believe that the Development was actually complete. They purchased in the knowledge of the physical condition at the given time.

112. The 1st Respondent argued that the lessees knew the position about ongoing construction and said that the asking price reflected that. The Tribunal identified no specific evidence that the asking price had been reduced for that reason against some other price which the 1st Respondent would have sought otherwise or otherwise about how the price was set. It is apparent, to somewhat state the obvious, that the lessees bought for given prices and must have regarded the flats to be worth purchasing at that price and in the context of the condition of the Development at that time. It is reasonable to infer that any would- be prospective purchaser who did not, would not have gone on to purchase.

113. In relation to the service charge years, as indicated above the Tribunal was troubled by the service charge period adopted by the 1st Respondent not corresponding with the service charge year as provided for in the Lease. However, the Tribunal considered the fact that the Respondents are permitted by the Lease to change the date on which the annual accounting period starts and of which they shall give written notice to the lessee as soon as reasonably practicable, with the Service Charge year being defined as the calendar year so commencing 1st January or, implicitly, the year commencing on the changed date which the Respondents decide on.

114. The Tribunal concluded, although the specific evidence was sparse and some reasonable inference had to be drawn, that the 1st Respondent had decided to change the service charge year. The Tribunal found that notice of that had been given by the provision to the Applicants of service cost budgets which adopted a different period, for example June 2021 to June 2022 albeit that the 1st Respondent had not identifiably specifically said to the Applicants that change was being made (and indeed that it is not apparent that the period was precisely one year). Insofar as the provision of a budget for a different period might be said to be lacking as written notice, the Tribunal determines that the Applicants were well aware of the period which the estimated costs related to and the estimated service charges payable by the individual Applicants with that and that the Applicants were not caused any prejudice by any arguable failing in the notice given.

115. The Tribunal therefore considers the service charges on the basis of the service charge year as amended to run from June and then 1st July of any given year onwards. The Tribunal accepts that, amongst the matters which were relevant to whether that change had taken place, the three documents sent to Mr Dabin which related to a period 1st January 2022 to 30th June 2022 cast some doubt on the change by their start date but did lend support by their end date.

116. The Lease enables the Respondents to demand service charges on account. The 1st Respondent sought to do so. The Tribunal accepts that by referring to a budget, it was adequately clear that the charges were estimated ones.

117. In addition, the Respondents must at the end of the service charge year provide final accounts and those accounts are required to be certified. To quote the provision again, "As soon as reasonably practicable after the end of each Service Charge Year, the Landlord shall prepare and send to the Tenant a certificate showing the Service Costs and the Service Charge for that Service Charge Year." Therefore, following the end of the service charge year commencing in 2021, there ought to have been that certificate for that Service Charge Year. However, there is no evidence that occurred. Likewise, at a similar point in 2023 for the service charge year commencing in 2022. The Applicants specifically asserted lack of compliance with the need for certification in their Statement of Case [47].

118. There is, as mentioned above, some sort of summary of actual expenditure in two separate documents [586 and 641], although it is not clear as to the period they cover, there is no discernible certificate and insofar as they might be said to include Service Costs, they do not provide actual service charges. In any event, they are not the account information sent to the lessees as the financial information for the 1st, amended, service charge year specifically. Their significance is more to cast some doubt on the figures emailed in April 2023.

119. It is not entirely clear what is meant by "a certificate" given that there is no indication of any given form of document but the Tribunal notes that the Lease, leaving aside any statutory or other requirements, does not need to be given by say a surveyor or an accountant or any specific other. However, it is notable that Mr Conway in his April 2023 email writes the following:

"CERTIFIED ACCOUNT?
CPGSW'S accounts are prepared under the Small Company Provisions, as recommended to CPGSW by its accountants. This has the benefit of reducing CPGSW's accounting costs, and the accounts were prepared on the basis that they are unaudited abridged accounts, which is common practice.

I have not yet asked my accountants to audit the Service Charge account Actual Cost for the following reasons ....."

[various reasons are then stated]

"COST OF ACCOUNTANT'S CERTIFICATION
I wish to emphasise that I am willing to arrange for the Service Charge Account to be certified by a Chartered Accountant.
If Leaseholders think that it will be worthwhile for Leaseholders to incur the cost of having the Service Charge Account audited and certified by Accountants, might I ask that you please confirm this?
When sending confirmation, could Leaseholders also please simultaneously write to ETC to confirm that ETC should pay the future invoice from the accountants regarding their work to audit and certify the Service Charge account?
This will act as an instruction to ETC to pay the accountants invoice from Leaseholder funds.

Regarding the scale of the audit work which would be required by the accountants, please note that CPGSW paid the workers as self-employed individuals, and the number of invoices to be audited for the Service Charge Account will certainly be in excess of one hundred invoices, across a number of different providers."

120. It would not be a stretch to read that last paragraph as seeking to dissuade the lessees from seeking certification by an accountant or for anyone to have concern about the motivation for such dissuasion and the Tribunal would in other circumstances have considered whether it ought to draw any inference. However, nothing specifically turns on that in the event given that it is abundantly clear that as a matter of fact there was no certification as well as for the other reasons set out below.

121. In any event, and accepting that the Tribunal must construe the Lease in the manner explained above and not on the basis of what is said in a separate and later document, there is a clear suggestion that what the 1st Respondent at least had in mind by reference to certification of the Service Costs and Service Charges was that they would be checked by an accountant, but more than that they would be audited, with the certificate being provided on completion of a satisfactory audit. In any event, the Tribunal considers that it is appropriate when construing the Lease to read into the provision in the Lease a requirement that the certificate was required to be provided by an accountant (although it would not be appropriate to read in a requirement for an audit, which is not stated or suggested by the wording used).

122. Irrespective of whether that is correct, there is also a clear acceptance by Mr Conway that none of his email or attachments constitute a certificate "showing the Service Costs and the Service Charge for that Service Charge Year" and hence do not meet the requirements of the Lease. It was not argued that the Applicants had agreed to waive the requirement for a certificate and there was no evidence of that.

123. The "Response to Direction 19.i" document from the 1st Respondent [626] also accepts lack of certification and adds the following:

"the payments to labour in regard to services were not invoiced separately, and hence Churchill Property Group South West Ltd's (CPGSW) Accountants are unable to certify the payments made for Services."

124. So, not only were the accounts not certified but they could not be. Given that- see below-for 2022- 2023 there were at least draft accounts prepared by an accountant, it was at first quite difficult to see why that did not happen for 2021- 2022. However, the above provides the explanation.

125. It is worth recording that Ms Newman in her response to the June Directions identified that the asserted actual accounts for 2021- 2022 were not certified by the time of transfer of the freehold from the 1st Respondent to the 2nd and the Tribunal infers have not been since.

126. So simply, it was a requirement of the Lease that there be certified Service Costs and Service Charges and so the lack of one or other, and in the event both, of them beyond the point at which it was practicable to provide them (see below) constituted a breach of the Lease by the 1st Respondent. If a party wishes to rely on the provisions of a Lease in order to demand money, it must comply with that Lease itself. The 1st Respondent did not.

127. The Tribunal has only referred above to an effect on Service Charges for 2023- 2024 because estimated charges for 2022 onwards ought reasonably to pre- date the date for certificated accounts for the previous Service Charge Year. The estimate for a given year is required to be provided "As soon as possible". That is not the same wording as the provision in respect of the certificate for the previous year.

128. It was not submitted by any party before the Tribunal why different wording was used but it is clear that it was. The two phrases used about estimated service charges and about certification do not mean precisely the same. It must be taken that the contracting parties intended a distinction: there is nothing within the Lease which the Tribunal determines suggest otherwise.

129. The Tribunal construes "as soon as possible" to be swifter than "as soon as practicable". In normal usage the first is intended to convey greater alacrity then the second. Hence, it is envisaged by the Lease that the estimated service charges for a given year are likely to be provided earlier than the certificate of actual charges for the previous year.

130. The Tribunal finds that logical- it is likely that the general expenditure for the previous year and likely expenditure for the next year can be identified more easily than the exact service costs can be confirmed and certified. The practical date on which appropriate certification can be given having checked matters sufficiently to so certify will reasonably be later than the swiftest date on which an estimate can be provided, which of its nature will not be precise.

131. That is relevant because the Applicants argued [58] that the demands for 2022 were unreasonable for not taking account of the money which had already been paid and which it was asserted ought to remain available. Whilst getting ahead of itself where the specific years are considered below, it is convenient to identify that the Tribunal does not accept that argument of the Applicants in respect of the 2022 estimated charges because the certificate of actual charges- and how those relate to payments made by the Applicants and other lessees- would be a later document.

132. In this instance, the documents about actual charges- although not certified- were much later, being only provided in March 2023. It is difficult to identify that provision nine and a half months after the end of the period equates to "as soon as practicable" but that specific timing has no practical effect on any charges and so the Tribunal does not regard it as material. In a similar vein a detailed profit and loss account [322] was produced by Eaton Terry Clark and provided to the Applicants and other lessees for the period 1st July 2022 to 30th June 2023 but as the estimated Service Costs and Service Charges for July 2023 onwards pre- dated the date for the certified figures for 2022- 2023, the contents of that profit and loss account were not relevant in the event.

133. As identified above, where service charges are estimates on account, the challenge must be to the estimate of service costs and the service charges demanded on account arising from those. Necessarily, estimated service charges are just that. They are in effect the lessees share of the likely expenditure during the year to which they are required to contribute. The overwhelming likelihood is that they will not be entirely accurate. They will also be prepared on the premise that will be no challenge to the nature of the work undertaken and the quality of that work, which must necessarily be a challenge brought against actual service charges based on the fact that the year has completed and during that year service were not provided or not to an appropriate standard. The standard of work and service which will be provided during a future period necessarily cannot be known in relation to a budget sum, given that is an estimate of expected expenditure and cannot predict any issue arising with the quality of the services and works provided. Hence, in principle the issues raised about the matters actually attended to during a given service charge year would be of very little assistance to the Tribunal unless they had been able to demonstrate that the 1st Respondent ought to have known when budgeting that the budgeted costs from which estimated service charges were calculated were unreasonable.

134. The next general matter which the Tribunal needed to consider was whether the sums which lessees were required to pay at the time of the completion of their given purchase were fixed charges or variable. In the event of a fixed charge, the Tribunal has no jurisdiction to make any determination in any event.

135. Mr De Beneducci advanced an argument in his Skeleton Argument that at the time of the Applicants being asked to pay a sum for insurance as part of the purchase funds the service charges were payable as a fixed sum and

not a variable service charge. Therefore, it fell outside of the scope of section 18 and the Tribunal consequently lacked jurisdiction. He particularly did so in respect of the insurance charge but the Tribunal considered that it ought to also determine whether there was relevance to service charges.

136. However, in relation to other service charges, the sums provided by the Applicant were clearly estimated ones on account. The costs had not yet been incurred and the sums could not be known. They would not be likely to be the same when the actual service costs for the year were calculated at the end of the year. The sums payable would in due course vary dependent upon the actual sums. The sums paid as part of the completion payment were not fixed ones and so fall within the jurisdiction of the Tribunal.

137. The last and significant general matter which must be recorded is that the Tribunal found it very difficult to work out exactly what the position was with regard to Service Costs and Service Charges. The various different documents in various different forms for various periods rendered any exercise startlingly difficult and that for a specialist Tribunal for which service charge disputes are perhaps the most common foodstuff.

138. The Tribunal considers that when it came to actual (although not certified) figures it was very difficult- even before this Decision and its impact- for the Applicants or other lessees to work out how much they had paid towards any Service Charges actually due and whether they had overpaid or underpaid in any previous year. Whilst by the time for the estimate for 2022- 2023 the actual figures for earlier periods would not have been reconciled, after that matters should have been clarified so that each lessee could identify what they were liable to pay, what they had paid and how that related to any further Service Charges demanded from them.

139. The Tribunal also records that Ms Newland contended that the 1st Respondent failed to retain the service charges paid in a bank account separate to the one used for construction costs and related matters. That is where the section 42 point arises, namely the fact that service charges should be kept in a separate account and should not be intermingled with other sums. The 1st Respondent accepted that in writing [669], giving the inadequate reason that its bank declined to open a separate account and not explaining why no other bank was approached and an account set up. An obvious difficulty and one which the Tribunal considers from the circumstances of the case did arise in this instance, is that it is that much harder to ensure that the amount of money held in respect of service charges is the correct one allowing for the costs having been expended which were entitled to be expended. Given the various figures produced by the 1st Respondent, the Tribunal finds that the 1st Respondent did not know whether it was the correct figure, even assuming the Service Charges and Insurance Rent to be payable as demanded.

140. Hence, the Service Cost and Service Charge position generally was something of a mess and thereby wholly unsatisfactory.

Insurance

141. There was a large amount of detailed information about the insurance elements of this dispute and so it merits repeating that this Decision does not, by any stretch, seek to cover all of it but rather sets out the determinations of the Tribunal having considered and weighed the points raised. As identified above, there is a covenant by the 1st Respondent to insure the Development separate from the covenants to provide Services. The definition of Service Costs and the requirements to certify those do not include the cost of the insurance policy. It merits noting that failings in respect of certification of Service Charges and Service Costs do not therefore impact on the payment for Insurance Rent.

142. It merits recording as to insurance generally that the 1st Respondent's position was that there were separate policies of insurance taken out to cover the construction works at the Development and hence the policies for which the Respondents were charged service charges did not include any cost related to that construction [e.g., 123]. The Tribunal accepted that position was correct, finding no evidence of it not being. In addition, the 1st Respondent's position was that the lessees were charged 50% of the cost of the earlier of the policies. Hence whilst the Applicants asserted that the cost was not apportioned to reflect ongoing construction work, the Tribunal understood that it had been and was content with the approach taken by the 1st Respondent.

143. It was common ground that the Respondents had utilised the services of an insurance broker, Aston Lark during the period of the Leases and the 1st Respondent said that it had done so since the time at which the 1st Respondent had purchased the Development, which was not challenged. The 1st Respondent contended that consequently there was no single "Statement of Risks" in respect of the development. In effect, Aston Lark received relevant information as it arose from time to time over the years. It was also said that nothing had been produced for the purpose of the proceedings notwithstanding that one had been requested by the 1st Respondent and promised by the broker.

144. The Applicants essentially asserted that there ought to have been such a statement each year in order to provide the intended insurer with the relevant information in order to determine the appropriate premium. It was effectively said that otherwise, the insurer would not have the correct information and the insurance may be voidable or payment out may be able to be avoided because of lack of the correct information as to risk.

145. The Tribunal considered that whatever the broker may be aware of, the insurance company would sensibly have required information about all matters relevant to risk and the broker would have needed to provide that. It was somewhat less than clear as to what had been provided. However, whilst the Applicants had concerns, there was a lack of evidence that the insurer from time to time had not been given appropriate information. It was unclear what the insurer might have required to know which had not been provided.

146. In respect of insurance, a significant aspect related to flood risk.

147. It is an obvious fact that the Development was by a river. It was a condition (condition 14) of the planning permission granted by East Devon District Council "the development hereby approved shall only be undertaken in accordance with the submitted Flood Risk assessment dated December 2012 and undertaken by WSP". The assessment included a requirement in paragraph 6.2 (under the heading "Residual Flood Risk Issues") that:

"All new build development will be raised above the 1 in 100 year flood level. However the listed Town Mill, Corn Mill and Dispatch Buildings are to be retained and redeveloped. For these buildings it is proposed to install all the electric apparatus above the 1 in 100 year flood level and look at proprietary demountable flood board systems to protect ground floor entrances".

148. Mr De Beneducci submitted in his Skeleton Argument that it was not a condition that demountable flood board systems were required to be fitted, merely the fitting of them was to be looked at. It was said that the 1st Respondent decided against adopting that approach and that it adopted other flood defence measures instead, for example installing drainage channels externally.

149. The Tribunal accepts that the assessment not only appreciated that these were historic buildings and so limitations were imposed by that but also agrees that it did not specifically require demountable floorboards and hence the planning permission based on that assessment did not either. Logically if such a system was not to be adopted, the alternative provision to deal with flooding was required to be reasonable but it has not been demonstrated that the overall approach was not within a reasonable range, much as the lessees had been critical, particularly of hydrosnakes.

150. There had, Mr Conway said, not been an event in which the Development had flooded within twenty years of ownership by the 1st Respondent and the Tribunal received no contrary evidence.

151. The Applicants also suggested in their statement of case that the 1st Respondent failed to ensure that the insurance was for "the full reinstatement value". It was consequently asserted that the insurance was "unfit for purpose and therefore the costs of any such policy as not having been reasonably incurred".

152. As the Respondent's Skeleton Argument pointed out, the Applicants' position adding their arguments together was that they should not have to pay any insurance for any of the period 13th December 2020 to 13th June 2024, including therefore within 2021. That is on the basis that the policies were not "fit for purpose" [43]. It was asserted by the Applicants that no evidence was provided that the policies were valid.

153. The Tribunal did not consider it unreasonable for the Applicants to have concerns. The Development did move from being unoccupied to

being occupied during 2021 and it is at least not clear whether the insurers were fully informed and there were notable fluctuations in premiums. The Tribunal identified that an unoccupied building policy has obvious potential to be problematic once there is an occupied building, and the Development became occupied when the first lease was granted, and lessees moved in. The Tribunal can identify potential for query from the insurance company, but as noted above, it has not been demonstrated that there was anything of relevance and the evidence indicated not.

154. The Tribunal determines that the Applicants failed to demonstrate that any wide- ranging issue arose with the insurance policies and that no benefit was obtained, or any other issue arose which was demonstrated to have the result that the premiums should not be payable. The Applicants were not able to advance any point sufficiently for the 1st Respondent to have to do more in the case than it did.

155. The policies were taken out with well- known reputable insurance companies. At first blush, the cover appears to be for the risks required to be covered by the Lease- certainly there was insufficient evidence to the contrary. As Mr De Beneducci observed, there was no logic to the 1st Respondent under- insuring. Or indeed doing anything else detrimental to the Development being insured. It is notable that no claim on the policies was required to be made and therefore it cannot be known what response there would have been to such a claim from the given insurer in the event that it had been made.

156. The fact that, as discussed below, a policy was cancelled, and a new one created in Spring 2023 rather than simply an amendment to the policy following a revaluation is odd, but the Tribunal concluded that it could not infer that there was any specific problem as alleged by the Applicants or otherwise. The particular policy is discussed further below.

157. There is also nothing in the Applicants' point about the policies being taken out in the name of the 1st Respondent. The 1st Respondent was the freeholder and the policies being taken out in its name is entirely to be expected. Mr De Beneducci may be correct that any tax impact falls outside of the jurisdiction of the Tribunal but the wider question of the premium being payable does not and the name of the policyholder being the 1st Respondent does not prevent the related insurance rent being payable.

158. The Applicants' potentially best point was that on 2nd April 2024, Allianz wrote to Howden UK Brokers Limited (which it said had purchased Ashton Lark [123]) to state that a policy incepted on 12th December 2022 by the 2nd Respondent was to be avoided on the basis that policy requirements were breached [275]. However, there were three reasons given for that, namely:

> "The Buildings were not built to plan and has not achieved Building Control sign under the Building Regulations, and has a number of Contravention Notices have been issued to the entity at the time. Fire Safety Plans and Strategy of the Property did not meet with the requirements.

Flood/Subsidence -a flood defence wall has suffered an erosion event and could fail.
Flood - Planning Conditions included the installation of flood boards to all entrances on the ground floor which has not been completed."

159. However, that is based on information provided by the lessees in effect- as the 2nd Respondent. The last matter is wrong. The lessees apparently told the insurer that planning conditions required flood boards, but they did not, the Tribunal has determined above. The event involving the erosion of the riverbank outside the flood defence wall occurred in December 2023 [related photographs 264- 269, particularly the last of those] and so cannot affect any policy already taken out by that time, although additionally it was not demonstrated to the Tribunal that the wall itself had been affected. Nevertheless, the fact of the actual event in December 2023 is likely to have been more relevant to an insurer than a possibility of an uncertain event prior to it.

160. That leaves the Contravention Notices and related. The Tribunal is not satisfied that those alone would have caused cover to be avoided. They may have, subject to the information provided to the insurer. Whilst the lessees, in effect, provided information, that is not to say that other information could not have been presented which would have altered the approach to cover. The Contravention Notices are said to date from October 2023 and November 2023 [59]. In any event, the Applicants have not demonstrated that where three reasons are given, the answer from an insurer would be the same if two of those three were removed.

161. It necessarily follows that the approach of either Allianz or AXA to some or all of the first reason alone cannot be known with regard to earlier policies. The Tribunal is cautious about assuming the response of them to a matter which arose during the life of these proceedings and relevant to these proceedings and does not consider that there is a proper basis for drawing any inference. The Tribunal re- iterates that the Contravention Notices had not been issued and so could not be notified and the flood defence wall event had not occurred. Indeed prior to May 2023, the final certificate remained in place.

162. So, the Applicants identified issues but not so as to demonstrate that there had not been cover in place at the relevant times for the risks which were required to be insured. Whilst it was a close-run thing, the Applicants did not get far enough that there was any greater response called for from the 1st Respondent than it provided, less than complete though that was.

163. Given that the Applicants have failed- as explained above- to demonstrate that the insurance policies lacked any value or sufficiently demonstrate any other issue, the question comes down to the cost of the policies and period of cover.

164. In that regard, it is very relevant that it is for the landlord to obtain cover having tested the market and ensured the premium is not beyond the usual course of business. The Applicants have provided alternative cost for

the insurance as at June 2023, from Foldgate and less expensive than the Allianz policy taken out at that time, and it was sensible for them to seek to do so. However, the 1st Respondent was not compelled to take out insurance with that or any other given insurer or at any other given specific cost. Hence, whilst there is evidence that the 1st Respondent could potentially have obtained different cover to that which it did, the Applicants have not demonstrated that the 1st Respondent failed to obtain a price in the usual course of business or otherwise obtained one which it was not properly able to.

165. Further, the Applicants have not provided alternative quotes for earlier periods, not that it would most likely have taken them anywhere if they had as will be gleaned from the previous paragraph.

166. The Applicants' statement of case advances an argument that the premiums were higher in consequence of the ongoing development works during the period that flats started to be sold and this point carries over to the December 2021 policy, at which time sales were ongoing. That is a more specific point and so is discussed below in relation to the 2021 to 2022 Service Charge Year.

167. The Tribunal considered whether the position was any different in this instance because of the specific reference in paragraph 2.1 of Schedule 6 to the Lease to the terms "represent value for money". As the Tribunal identified above, that phrasing is unusual.

168. However, there is nothing in the Lease to demonstrate that the contracting parties meant anything different to the usual. There is no explanation of the term and nothing to explain an intention for it to depart from usual principles. The Applicant's notably did not seek to argue that it did. The Tribunal does not consider it appropriate to venture not a point not raised and where potentially construing the Lease as requiring something specific would at best be to undertake a difficult and uncertain task.

169. The Lease did provide that the 1st Respondent shall supply a lessee with a copy of the receipt for the insurance premium and the Applicant's argued in their statement of case [43] that the 1st Respondent had failed to do so. The Tribunal determines that does not of itself prevent the cost of the premium being recoverable as service charges, although it could impact of an ability to show the cost was incurred.

170. The last general matter in relation to the cost of insurance is that set out above about fixed sums. The lessees were charged by the Respondent as part of the completion sum their contribution to the cost of the insurance policy [633- 635]. They had to pay the specific sum. That was either in respect of 2021 or 2022, dependent upon when the given lease was purchased. The costs were fixed as being definite sums payable under contract to purchase the given leasehold interest and where the insurance had been paid for and the exact figure was known. It would not vary on the basis of services provided or work done as applies to more general services.

171. However, the Tribunal rejected the argument that the sums were fixed ones. There was a specific known amount for the year in which the Applicants each purchased. However, the Applicants were not required to pay a fixed sum for insurance irrespective of actual cost. Rather it is clear from the Lease and the actual way in which the lessees were charged that the sum required as a contribution to the cost of insurance varied according to the actual cost incurred by the Respondents. The fact that it was a known amount at any given time, including the time of the purchase of the leases by the Applicants, did not make it a fixed charge.

172. The Applicants raised other points about payment for the policies and tax matters but as speculation and not providing any case to be answered on those points.

173. It merits identifying that in respect of insurance, the were specific sums payable for each premium, which would not be hard to identify, and the Tribunal does not consider the failure to operate a separate bank account or the related obvious issues relevant to service charges generally were such as to prevent the Insurance Rent being payable.

Specific matters year by year

174. It will be appreciated that the above matters render much of the issues about specific years of service charges not to merit detailed consideration. As identified, the cost of insurance is not a Service Cost as the Lease provides for those separately, but it is convenient to address both insurance and Service Charges for consistent periods as far as practicable and it has been possible to do that to an adequate extent.

A)- June 2021 to June 2022

Service charges

175. The Charges were affected by the uncertainty as to which of the statements of actual expenditure was correct. In principle the budget items would had been overtaken by actual ones as provided in April 2023, at least in terms of service costs, but the actual ones had not been certified pursuant to clause 4 of the Lease and so were not properly finalised.

176. The Tribunal considers that no service charges are payable because during the year, albeit to a greater extent at the start and a lesser extent at the end, there was ongoing construction work and the Respondent failed to demonstrate costs beyond that recoverable as Service Charges.

177. The Applicants' challenge to the service charges for the period June 2021 to June 2022 as provided at the hearing (and in the Statement of Case [51]) was fourfold (although the original application form had set out additional matters [18]). The Applicants dispute the entirety of the service charge related to maintenance and cleaning, management fee, sewerage and pump service, and fire inspection. The service costs of those were

£16,168.50 in total, although the Applicants' shares were only a portion of that. The Applicants also referred to a lack of invoices, receipts and contracts. The 1st Respondent provided various lists of payments made to either its witnesses or others during the Year [499- 508].

178. It is rather stating the obvious to observe that the challenge in respect of this year on behalf of each of the two Applicants is only for the period commencing on the date on which they became lessees, so 7th December 2021 for the 1st Applicant and 8th April 2022 for the 2nd Applicant. Any service charges applicable to any service costs before those respective dates are irrelevant to these Applicants. Hence, if any charges had been determined to be payable, they would only have related to service costs from the date of the commencement of the given lease up to and including30th June 2022. The Tribunal notes that the budget prepared for the year appears to cover the entire year: the Tribunal understands that in practice the lessees were charged pro- rata from the date of their particular leases and so the payments made would have been correct at the time, albeit not now when the Tribunal has determined that no service charges were payable in any event. However, if the lessees were not in fact charged pro- rata, they should have been.

179. The Tribunal found that construction work was ongoing internally and externally during 2021 and at least until Spring 2022 (and to a degree thereafter), as photographs make clear [P2- 10 and P22- 30] and mess was being caused from the ongoing work. The Tribunal has noted the description of work undertaken [590- 600] but cannot identify work which was obviously unrelated to ongoing construction and related. Insofar as there was work which was required in connection with completion of the construction of the Property, the Tribunal unhesitatingly determined that was not cost which was recoverable as service charges.

180. The Tribunal determined that what was described as maintenance and cleaning was required in relation to the effects of the ongoing construction and the 1st Respondent had failed to demonstrate any cost which was unconnected with that. The 1st Respondent was reliant on the vague and unconvincing evidence of the witnesses who did not attend. They said they "carried out general cleaning and maintenance to the common areas inside and outside the building" themselves [131] and/or who witnessed "several other people who carried out cleaning of communal areas and grounds maintenance" [132]. However, that does not identify the reason for the cleaning and maintenance and demonstrate that it was other than the construction work still ongoing. The Tribunal accepted that only a fraction of the time of Chris Humphries for example related to cleaning and maintenance of communal areas and only a small sum was apportioned to service costs but that did not demonstrate the 2.5% to be appropriate or indeed any of the time to relate to matters not arising from construction. The fact that the fraction was small could not of itself demonstrate the time charged to have been spent on recoverable matters.

181. In any event, the Tribunal accepted the Applicants' case that the standard of cleaning and maintenance had been poor, such that even if any

did not arise from construction works, the reasonable costs for such would have modest at best and the service charges payable by the two Applicants for the relevant periods of their leases between June 2021 and June 2022 would have been minimal. In the circumstances, the Tribunal finds it unnecessary to seek to determine any specific figure which would have been payable by each Applicant in the event any service charges for this item had been found to be payable.

182. The Tribunal has had regard firstly to the fact that the financial information provided by the 1st Respondent with the email of April 2023 provided five sums specifically for window cleaning and gave payment dates. Secondly, to the fact that there were no invoices at that time, as the Applicants complained about. However, the question of relevance was not one of whether work had been undertaken but the reason for that and there is no need to repeat the comments above.

183. In respect of the management fee (shown on the June 2021 budget as "Agent fee", the Tribunal was unable to identify any management of the Development as one occupied by lessees. There had been insurance obtained but that pre- dated any lease. Anything else done which could be discerned from the evidence produced related to the construction of the Development and sales of properties within the Development. The Respondent failed to meet the challenge made and to justify the management fees as relating to actual management pursuant to the leases in any given sum or at all. The Tribunal did not therefore need to analyse the quality of any management undertaken.

184. The information about Sewerage and pump service was sparse but in the face of the Applicants' challenge, the Respondent failed to demonstrate the costs as related to the services required pursuant to the Lease as compared to related to development work. The same applied to the fire safety inspection and demonstration that related to fire safety of the occupied buildings. It was also unclear to the Tribunal when either of those last two costs was incurred and whether one or other Applicant was a lessee by that time, so that was another reason why the 1st Respondent had failed to demonstrate those costs to be payable.

185. Hence, even if there had been certified service costs and charge as required, the Tribunal would have determined no service charges to be payable by the Applicants for the 2021- 2022 service charge year.

186. The Tribunal does note that the fee budgeted by the 1st Respondent for management of the development is the same figure as included in the Cost Summary provided in April 2023 (albeit that how that was calculated is wholly unclear), that the window cleaning cost was proportionately considerably less than budgeted for, that the description in the Cost Summary of "Communal Area Costs" does not appear in the June 2021 Budget and appears to be far more than any costs estimated in the Budget to which it could identifiably equate, that the fire inspection cost is slightly higher and that the sewerage pump cost does not appear to any equate to any item in the budget (and that the Summary includes insurance cost

which is considerably higher than budgeted for because it includes a further policy). Even if either Applicant had been liable for a full share of the costs, it is unclear what effect all that had on the amount payable and the amount actually paid. Nevertheless, whatever the Applicants did pay as Service Charges for Service Costs was not payable in light of the Tribunal's determination that no charges have been demonstrated by the 1st Respondent to be payable for that Service Charge Year.

187. Nothing therefore turns on compliance with statutory requirements or lack of it. However, the Tribunal addresses that for completeness, given the Applicants specifically raised the issue. The Applicants contend lack of compliance with sections 46 and 47 of the Act and with section 21B. The demand was made by way of the budget in the Lease. The budget does not provide the landlords details specifically but the Lease in which it is provides does give those details, so it possible that compliance would have been achieved. The Tribunal does not need to consider the point fully as no service charges are determined to be payable in any event for the particular year, for the reasons set out below.

188. On the other hand, there is no evidence that the required Summary of Tenants Rights and Obligations was provided in respect of any of the estimated or other service charges at any time. That is a fundamental statutory requirement with a clearly identified effect. The Tribunal determines on the evidence, that the 1st Respondent failed to comply and so the demands were also invalid for that reason. Hence no service charges would have been payable for that reason even if the 1st Respondent had demonstrated that otherwise they would have been.

189. It should be made clear that is with regard to the estimated figures. When Eaton Terry Clark in January 2023 sought to demand balancing sums from various lessees [various of 712- 732], they did provide the required information with regard to section 47 and whilst it is less clear from the contents of the bundle, they may have complied with section 21b. However, those are not relevant given the lack of certified Service Costs and Service Charges so need not be dwelt upon.

Insurance

190. The Tribunal determines that charges for the insurance were payable, insofar as they related to a period after the given lease commenced. The total cost for insurance shown in the Cost Summary sent in April 2023 is £20,950.00.

191. The first policy taken out which covered the service charge year 2021 was an Allianz Property Owners policy commencing on 15th December 2020 and ending on 14th December 2021 [630- 632]. The premium was £16,891.84. Plainly that commencement date was in 2020 but there were no leases until 2021 and hence the relevance is only to the 2021 service charge year. It was said by the Applicants that in total £8,793.01 of the premium was charged to lessees, although the budget prepared by the 1st Respondent has a total for property insurance as £8535.00, which the

Tribunal infers to the calculation made by the 1st Respondent of the proportion applicable to the period 1st June 2021 to the end of the policy.

192. The Tribunal is unclear whether the Applicants were only charged their relevant share of the costs of the insurance policy as Insurance rent for the portion of the policy year for which they were lessees but the Tribunal unhesitatingly determines that the lessees could only be charged for that period- the Tribunal found it entirely simple that none of the lessees should be liable for any share of the cost of insurance for any period prior to which they became the lessee.

193. For the 1st Applicant that was 7th December 2021 to 14th December 2021, some eight days, so the maximum sum which can be in dispute was some or all of 3.85%. of the cost of the insurance for the relevant eight days. That was £7.42 assuming the Applicant's figures to be correct. That is a small sum by any reckoning. For the 2nd Applicant, the sum was nothing at all. He did not purchase until after the 15th December 2020 to 14th December 2021 policy had expired.

194. The Tribunal determines that the 1st Applicant has failed to demonstrate that some or all of the £7.42 constituted a charge that should not be payable. Given the amount involved, the Tribunal declines to say any more.

195. The next insurance policy was taken out commencing 15th December 2021 [633- 635]. That policy was the same as that for the previous year at a premium of £19,439.84 of which it was said £9,107.43 was charged to lessees [705- 732]. The contributions to the cost of the insurance policy were demanded from lessees by way of demands dated 15th February 2022, although the Tribunal infers that is insofar as the leases had commenced by that date. As explained below, whilst the policy was originally taken out for a period of twelve months, in the event, on 20th June 2022, the policy was cancelled.

196. The service charges payable by the 1st Applicant for the above would have been £179.64 and by the 2nd Applicant £70.13 if the policy cost as charged is reduced pro- rata. The first of those is 3.85% of the premium charged as charged to lessees at £9107.43 then scaled down for six months and 5 days i.e., 187 days (so £4666.00 taking a daily rate of £24.95) from the date of the Lease to the date of cancellation. The second of those is 3.85% of the premium scaled down for the 73 days from the date of the 2nd Applicant's lease to the date of cancellation at the same daily rate.

197. The 1st Respondent presumably did not know that it would cancel the policy in June 2022 or at what cost when it demanded Insurance Rent for the Allianz policy, even by April 2022 from the 2nd Applicant. The Insurance Rent would have been a share of the cost of the policy to end of the policy at that time. Any lessee who had paid a share of the last Allianz policy would be due a refund of the contribution paid for the period 21st June to 14th December 2022, subject to any recoverable charge of any

administration or other costs of cancellation, less their contribution to the costs of the new policy, the cost of which is markedly lower.

198. The Tribunal could find no evidence of any cancellation costs or lack of them and therefore finds that the 1st Respondent has failed to demonstrate any. Accordingly, the Tribunal finds that any sum beyond the pro- rata sum was not payable in the event. Plainly, where the Applicants had paid sums to the cost of insurance with Allianz and part of that cost had been refunded to the 1st Respondent, the correct Insurance Rent sum had been reduced and the excess was a credit against shares of the cost of the next policy or policies and/ or other Service Charges.

199. It was said on behalf of the 1st Respondent that the Allianz policy was cancelled on 20th June 2022 so that the 1st Respondent could take advantage of the more attractive premiums available for finished and (by that point fully) occupied buildings. Insurance was then taken out commencing 21st June 2022 for a period intended to be until June 2023 as an AXA Commercial & Residential Landlord policy at a premium of £3,049.99 [636- 639] and charged to leaseholders in full.

200. That premium is relatively inexpensive and far lower than that for the earlier policies. Save for the significant change to the cost and the increases in the following Service Charge Year, no specific matter was identifiable. The Tribunal was content that the premium was a reasonable cost and that the Insurance Rent arising was payable.

201. It also merits recording that £8,793.01 plus £9,107.43 plus £3,049.99 does total the £20,950 or thereabouts which has been stated in documents as the actual cost for the Service Charge Year- more accurately £20,950.43. The Tribunal does not give that £0.43 particular significance.

202. The Applicant asserted [519-523] by email from Mr Conway to Caroline Pomeroy, that "A new policy was taken out in June 2022 once work had completed, and this was to enable leaseholders to take advantage of the lower insurance premium that would apply once the properties were fully completed and occupied".

203. That comment comes with the implication that the premium was higher than otherwise previously for reasons including works not being completed and or the Development not being occupied to one extent or another or not fully occupied. Given that the Development started being occupied in June 2021 and the Tribunal perceives would have moved from being occupied to being occupied, at least to an extent, at that point and given that the previous policy was taken out in December 2021 and there were lessees by then, the Tribunal surmises that the word "fully" was the key one.

204. The impression created is that the cost of the earlier policies would have been lower if the Development had been fully completed and perhaps fully occupied throughout. However, as identified above, the Applicants and other lessees were aware of the position with the Development at the

time of their purchase and the Tribunal does not consider that the premiums prior to June 2022 should be considered unreasonable on the basis of the amount that they might have been in a different position which did not exist.

205. The Applicants said that policy should be voided. However, they have failed to demonstrate that as appropriate, as explained above, and such an action would have been a matter for the insurance company if it had considered that appropriate.

206. The charge payable as insurance rent by each of the 1st Applicant for the 3.85% share of that full third premium, the June 2022 AXA one, is £117.42.

207. The Tribunal finds that the 1st Respondent, through Eaton Terry Clark, did demand the balance of the actual Insurance Rent for insurance premiums paid out in 2021- 2022 by way of invoices dated 22nd February 2023 [see various of 712- 732 for various lessees], so rather late but not so as to prevent the sums being payable if otherwise payable. The demand met the requirements of sections 21B and 47. Hence any appropriate balance sum was payable.

208. However, the demand was £477.98 (save in some other instances it was £110.00) and it is not possible to discern how that (indeed either) sum was arrived at. It is not explained and does not accord with any of the figures set out above. In the premises, the Tribunal does not give weight to the particular figure and maintains the sum it has calculated.

209. The Tribunal understands that the challenge to insurance did not include the sum for directors' and officers' insurance, which is not defined as insurance in the Lease but would be a separate service charge item. The Tribunal therefore only notes in passing that such insurance is not normally chargeable to lessees, being a company expense if the company chooses to incur it, but that the Tribunal has not been asked to make any specific determination on the list of Service Charge items in the Applicants' Statement of Case and list extracted from that presented at the hearing.

210. The total sum therefore payable by the 1st Applicant for Insurance Rent during the Service Charge Year 2021 to 2022 is therefore £304.48 and the total sum payable by the 2nd Applicant is £187.55. The Tribunal does not determine any accounting consequences for that year.

B- July 2022 to June 2023

Service Charges

211. The original demands for estimated Service Charges for this Service Charge Year were provided by Eaton Terry Clark, the managing agents by then appointed, dated 1st July 2022 and for a period to 31st December 2022 according to emails in the bundle which make reference to those. Further,

the Tribunal understands, a demand was issued dated 6th December 2022, related to the period 1st January 2023 to 30th June 2023. Whilst the Tribunal identifies only one payment date in the Lease, 1st January, it has not been argued that any specific issue arises with six- monthly demands for this Service Charge Year. The Tribunal has noted some comment about how those came about but need not reach a determination.

212. A budget was prepared [643, although shown sufficiently small so as to be difficult to read in the electronic bundle] with schedules [644- 648]. Estimated Service Costs were listed under various categories. It has not been suggested that the Service Charges demanded failed to properly apportion those. It was said [605] that budget was an estimate "based upon the original budget estimate, increased in line with inflation, and adjusted where costs are actually known".

213. There was subsequently a revised budget on 11th November 2022 and the Tribunal understands that demands were issued related to that, perhaps the December 2022 ones reflected that although it is not clear. There were email exchanges between the lessees and the agents about the budget in June 2023 which touch upon this Service charge year. The Tribunal only has regard to the original one. The basis in the Lease for a revise budget mid the Service Charge Year was not identified on behalf of the 1st Respondent and there would have been a balancing exercise at the end of the Service Charge Year. It might be that the revision of the budget should be taken to suggest a failing in the original budget, but the Tribunal does not consider that has been demonstrated here.

214. The Applicants in the addendum to their application form [22] set out ten items (in addition to buildings insurance). In the document presented at the hearing and the Statement of Case [53- 54], eleven items were listed across this Service Charge Year and the next one, some with the same titles as in the application but others with quite different titles and sums. Amongst complaints was made was that the 1st Respondent had failed to provide any funds to the agents and so little in the way of services were provided for the first few months as there was, the Applicants assert, no money held by the agents from which to pay the contractors. It was said that the standard of works and services was "poor to very poor". The agents did set up a specific account for payments from lessees for the Development.

215. However, none of the information which the Tribunal can set out comes from the actual demands made for the estimated service charges, if indeed there were any beyond the provision of the budget. The Tribunal was not taken to any and could not find any in the bundle.

216. Given that later demands from the agents did so, it is quite possible that there were demands and that the demands had complied with those statutory requirements and were otherwise in compliance with the Lease. However, the 1st Respondent chose not to provide them. It could be inferred from that lack of the demands that the 1st Respondent knew that they did not comply, but the Tribunal considers that would go too far.

Rather the Tribunal determined that it could not confidently find that valid demands had been sent, set against the recent appointment of the agents and given the confused state at that time and in the absence of sight of the demands to demonstrate their validity.

217. The Tribunal therefore determines that on account estimated Service Charges for 2022 are not payable.

218. The Applicants also explained that draft accounts [664- 667] for the period June 2022 to 30th June 2023 were provided by way of email from Eaton Terry Clark on 11th January 2024. They complained in Ms Newland's response to the June Directions that was more than six months after the end of the period and the Tribunal cannot identify that January 2024 was obviously "as soon as practicable". However, more significantly draft accounts are no more than that, such that the Tribunal determines that there were no finalised Service Costs and Service Charges for this Service Charge Year.

219. The Tribunal acknowledges that the document is provided from accountants and so it might be expected contains accurate figures for the expenditure for the year or at least would do once finalised. It is the lack of finalisation which is relevant because the Tribunal does not know whether the figures stated are the eventual Service Costs and in any event the document does not and neither does another one, provide actual Service Charge figures.

220. The Tribunal determines that if it were later determined to be wrong about there being no valid demands on the evidence provided to it, it could only consider estimated figures on account. Hence, the question would be the reasonableness of the Service Costs on which the estimated Service Charges were based.

221. The demands made were said by the Applicants to contain errors [51], for example with bank accounts and as to apportionment, but it was not said that applied in respect of these Applicants. It is said that there was a mid- year adjustment but in July 2023, which was not in fact mid the amended Service Charge Year and whilst it was said to arise from a realisation that the Service Charge Year should be the calendar year, the Tribunal has found that was amended. The status of that attempted adjustment must therefore be doubtful, and the Tribunal finds that no additional Service Charges payable in the 202- 2023 Service Charge Year arise from it.

222. The budget figures provided by the 1st Respondent contain the sorts of matters which would be expected and by then the Development was complete. They were for the first year in which the Development had been fully occupied and so there is ample scope for uncertainty as to how much the Service Costs should be expected to total. The approach described on behalf of the Respondent as to how the figures had been arrived at was in principle a reasonable one and the Applicants certainly failed to demonstrate the contrary.

223. Accepting that the Applicants could dispute actual Charges on the basis of the quality of work or service, that is not relevant to estimated on-account figures and those figures do not stand out as being unreasonable. The Tribunal found on the evidence that they were reasonable. The Tribunal notes the complaints about the standard of works and services, including as to fire safety, during 2022- 2023 but those are matters relevant to actual Service Charges and not to estimated ones.

224. Hence, no Service Charges were payable on the cases provided but if there were to be valid demands for estimated Service Charges for the Year, the sums would, if in the correct proportions pursuant to the budget, be reasonable. That said, and as identified in other observations by the Tribunal, there ought by this point to be finalised Service Costs and Service Charges and those ought to be certified. It would be far too late for estimated demands by now.

225. It may be that to the extent that there are actual Service Charges demanded as certified, any issues about actual standard of work and of service can be raised. It may be that the correct figures differ for one reason or another from the estimates. However, that is a separate exercise to be undertaken if relevant on the basis of such actual Charges as and when they exist: it does not form part of this case.

Insurance

226. As identified above, the position in relation to insurance was different to that of Service Charges, in particular the lack of certification was not relevant.

227. The insurance position during this service charge year as amended was again somewhat messy because the policy taken out on 21st June 2022 was cancelled early, on 12th May 2023.

228. That was said to be in consequence of a revaluation carried out and dated 7th April 2023 [270- 273] by W T Hill Ltd. It is apparent that the revaluation took place. It is not clear why a supplement could not be paid on top of the premium already paid and covering the last portion of the period of the policy but equally, the Tribunal received nothing indicating whether that would or would not have reduced the cost involved.

229. In its place, an AXA temporary policy was taken out for the period 13th May to 12th June. In contrast to the previous premium of £3,049.99 for the year, this policy cost £2769.32 for a month.

230. This is the high point of the Applicants' case that there was an issue with insurance cover. Whilst the contrast between the costs of the Allianz policies and the first AXA one was marked but had a potentially logical explanation in terms of occupancy of the Development, potentially combined with different approaches to cover by two different insurance

companies, there was an obvious and immediate contrast between the cost of two policies taken out with the same insurer.

231. Nevertheless, whilst the taking out of a temporary policy is something which the Tribunal finds surprising, there is no doubt that a revaluation had taken place and so there had been a change to the cover required. Equally- and the Tribunal considered significantly, although AXA had increased the cost of the premium, it had not refused to provide cover, such that there was apparently nothing which led AXA to consider that was appropriate.

232. It was said on behalf of the 1st Respondent that its insurance broker conducted an extensive marketing exercise prior to securing this policy [509-510]. There was no contrary evidence. In principle, the lessees were all liable for a share of the £2769.32. 3.85% of that is £106.61.

233. That ought to have been less any sums paid for the June 2022 policy which were refunded by AXA to the 1st Respondent, if any. Given the late stage of the policy and any administration fees and doing the best that it can on the available information and on the balance of probabilities rather than anything approaching certainty, the Tribunal finds that there was no refund. The Tribunal accepts that is a contrasting approach to that taken to the change of policy from Allianz to AXA in the previous year but that reflects the differing time periods and the differing balance of probable situations.

234. On 13th June 2023, a policy was taken out for the period to 12th June 2024. The 1st Respondent returned to Allianz. The premium was £23,547.88. Demands were made for the insurance rent in respect of that on or about 24th June 2023 [650-651].

235. The 1st Respondent additionally incurred a broker's fee to Aston Lark which it charged to the lessees as service charges in the sum of £2500. That is to say not as Insurance Rent and it was apparently a separate sum to the premiums for the policies. Therefore, the Tribunal does not consider it in this part of the Decision but rather it fell to be dealt with alongside any other Service Charges. However, that will be actual charges because the broker's fee did not form part of the estimated Service costs for 2022-2023 and so was not contributed to in the estimated Service Charges.

236. The 1st Respondent's case is that the market was approached. Mr Robinson queried that and the Respondent replied to him. The Tribunal is content that the brokers did approach the market.

237. It is the 1st Respondent's case that the insurance brokers were informed by Ms Newland of the issue relating to Assent's withdrawal of its Full Final Certificate on 7 June 2023 at the latest [580-582]. However, the Respondent argues that there was no apparent increase in the insurance premium payable as in consequence and nor did Allianz insist on the imposition of any new conditions on the policy, so that matter had not effect.

238. The Applicants' case was that £13,000 of that Allianz premium reflected the lack of Building Regulations approval. However, no basis for that was provided. There was no evidence that insurance could have been obtain for approximately £10,000.00 or any other figure less than the 1st Respondent actually paid in the event that no issue had arisen.

239. The Tribunal did not find it helpful to compare the cost of the further Allianz policy with the cost in 2022 from AXA, which was something of an anomaly. The cost is not markedly out of kilter with the policy taken out in December 2021 when there was, albeit erroneously, a final certificate. In the experience of the Tribunal, the cost of property insurance has generally risen since then and the revaluation will have impacted. Such revaluations are common and an increase in value of the insured property will, in the Tribunal's experience, usually impact on the costs of the insurance policy, much as the Tribunal does not seek to suggest to what extent in any given instance.

240. The Tribunal is not seeking to make a determination which enables it to weigh those matters precisely. The Tribunal refers to them because they lend no assistance to the Applicants where the Applicants cannot point to anything else of potential concern which might have led to an increase in the amount of the premium other than the simple lack of final certificate in itself. The Tribunal carefully noted the variations in the premium levels but those did not make out a case in themselves.

241. The other point relevant to this policy, as addressed above, is the cancellation letter of 2024, cancelling back to as at 12th December 2023. That means that the policy remained in place for the period prior to the ownership of the 2nd Respondent being transferred to the lessees.

242. The 1st Respondent sought insurance for an occupied building through brokers and with an up- to- date valuation. There is sufficient on which the Tribunal can properly infer that the brokers went to the market and the insurance was obtained on an arms- length basis. There is no evidence that the 1st Respondent incurred cost which was not a market rate, irrespective of whether it might in principle have been obtained at lower cost.

243. The Applicants have failed to demonstrate that the premium in June 2023 as charged was at a greater level than it otherwise would have been because of any issue arising and more generally that it is not one which the 1st Respondent could properly incur. The Tribunal determines the consequent Insurance Rent charged to be reasonable for that policy at the time.

244. However, the premium needs to be scaled down to reflect the period until it was cancelled and so the Applicants should only pay proportionately for the period of cover, so whereas the initial payable by each Applicant for the Allianz policy is £906.59 (3.85% of £23,547.88) that is not the correct figure for Insurance Rent in the event.

245. The Tribunal cannot identify the sum refunded to the 1st Respondent, if anything, and cannot identify whether that was affected by any administration costs or other charges applied by the insurer. The email from Howden to Otter Mill Residents dated 6th March 2024 [274] talks about the policy having been cancelled and re- issued, such that save for a change in the entity covered from the 1st Respondent to the 2nd Respondent, the cover appears to have continued and on what were at least initially the same terms. There is not information which the Tribunal has noted which indicates that there was any additional cost by way of charges from the insurer and the parties have not highlighted any.

246. The Applicants should not pay more than the cost of a policy for the period 1st July to 11th December which the Tribunal finds the reasonable cost of is a proportionate amount of the overall premium for the original year of cover. 1st July 2023 to 11th December 2023 is 164 days.

247. The Insurance Rent that the Tribunal therefore determines to be payable by each Applicant for the Allianz policy is £407.35 (3.85% of 164/ 365 of £23,547.88).

248. Hence the total Insurance Rent as determined for the 2022- 2023 year is £513.96.

C- June 2023 to December 2023

Service Charges

249. The Respondent failed to make a demand which triggered an obligation for the Applicants to pay. It follows that none of the Service Charges for 2023 are payable The end point of the applications as made by the Applicants- and including the additions permitted by the Tribunal- was December 2023. Whilst the Directions provided that should be 31st December on the basis, the Tribunal perceives, of the Service Charge Year under the Lease- subject to variation- being the calendar year, the Tribunal does not find it necessary to go beyond the point at which the ownership of the 2nd Respondent changed, given that provided a very clear break and after that date the lessees who were directors and members could approach matters in a different manner to previously.

250. Eight items (excluding buildings insurance) were described as challenged in the addendum to the application [23]. Again, the descriptions differed in the main in the list presented at the hearing and in the statement of case [54- 55], although nothing is affected by that for the reasons explained below. The Applicant complained about the lack of servicing for the sewage pump in July 2023 and about the standard of works and services, amongst other matters.

251. Given the determination by the Tribunal that the 1st Respondent was in breach of the Lease for failure to provide the certified Service Costs and Service Charges which it was required to for June 2021 at the time of the estimated service charges in June 2023, none of the estimated service

charges were payable by the Applicants for the reasons explained above. The fact that the requirement for certified accounts had not arisen by the time of the demand in 2022- 2023 no longer held water by June 2023.

252. On that basis, the specific sums charged, any errors with those, and the specific challenges to them, insofar as those properly apply in respect of what are estimated sums, are not directly relevant. Challenges which might be made to actual Service Charges, whether the standard of grounds maintenance and works or otherwise, are not relevant. As the Service Charge Year has ended some weeks back, there ought by now to be actual Service Costs known and actual Service Charges for 2023 to 2024.

253. The Tribunal reaches no firm determination as to whether the estimated Service Charges would have been payable. Its initial view is that by that stage, the 1st Respondent was not able to make a proper decision as to the sums in the absence of any previous certified accounts where those should by then have been available, not least where there had been some differences between figures for the year which ought to have been certified (so 2021- 2022) and the Tribunal could not determine the Service Costs to be reasonable against that background. However, it is not necessary to go beyond that in the event.

254. Equally, whilst the budget prepared in June 2023 was for a period 1st January 2023 to 31st December 2023 [649 and then 652- 657 for schedules], firstly that appears to be on the basis of the original Service Charge Year which the Tribunal has found was altered. Secondly, the budget is therefore for the wrong period in the event. Thirdly, there was duplication with some of the previous Year. Fourthly, it is not possible to discern the amounts for the period 1st July 2023 onward and those do not cover the whole of the subsequent Service Charge Year. More could be said. However, as the Tribunal has determined that the estimated Service Charges are not payable in any event and so further discussion of this budget serves no useful purpose.

255. The estimated Charges are not payable irrespective of compliance with statutory requirements under section 21B and section 47 and so a determination as to what had been sent with demands in this Year is unnecessary.

256. This determination does, it must be emphasised, only apply in relation to the estimated charges. The Respondents not prevented from demanding actual service charges once there are certified Service Costs and Service Charges for the Service Charge Year 2023 onwards and the Applicants can then challenge them if they choose to.

Insurance

257. As the last policy for a year had been taken out in June 2023, by the end of the period for which the Applicants required a determination, i.e., December 2023, there was no other premium charged. Hence insofar as there may have been a subsequent policy taken out within this service

charge year, presumably in or about June 2024, that does not fall within the scope of these proceedings.

Decision in respect of disputed items

258. The effect of the above findings and determinations is that the Tribunal determines the_Insurance Rent to be payable by each Applicant in the sums demanded of:

June 2021 to June 2022 inclusive	**-1st Applicant**	**£304.48**
	-2nd Applicant	**£187.55**
1st July 2022 to 30th June 2023	**- (both)**	**£513.96**

259. Further, the Tribunal determines there to be no Service Charges (as defined in the Lease) to be payable by either Applicant.

Applications in respect of costs and fees

260. As referred to above, applications were made by the Applicant that any costs incurred by the Respondent in connection with proceedings before the Tribunal should not be included in the amount of any service charge payable by the Applicant pursuant to section 20C(1) of the Landlord and Tenant Act 1985. In addition, an application was made pursuant to paragraph 5A of the Commonhold and Leasehold Reform Act that the costs of the Applicant's application should not be recoverable as administration charges. Those originally related to the Service Charge Year 2021- 2022, but the addendum added them for the later Years.

261. It was said by the Applicants that those were also made on behalf of a list of identified lessees- update in the addendum [23- 24]- but with no document signed by any of those indicating that they sought to make such an application or authorising the Applicants to proceed with it for them. Consequently, the determination again only relates to the two Applicants themselves.

262. Section 20C (3) of the 1985 Act, provides "the ... Tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances". The Tribunal is given a wide discretion. The provisions of paragraph 5A are equivalent and for practical purposes the test to be applied to each limb of the applications that costs of the proceedings should not be recoverable is the same.

263. The provisions of section 20C were considered in *Re: SMCLLA (Freehold) Ltd's Appeal* [2014] UKUT 58, where the Upper Tribunal held that:

"although [the First-tier Tribunal] has a wide jurisdiction to make such order as it considers just and equitable in the circumstances" (at paragraph 25), "an order under section 20C interferes with the parties' contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only

after considering the consequences of the order for all of those affected by it and all other relevant circumstances" (at paragraph 27).

264. In *Conway v Jam Factory Freehold Ltd*, [2014] 1 EGLR 111 the Deputy President Martin Rodger QC suggested that, when considering such an application under section 20C, it was:

"essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make".

265. Whilst there is caselaw in respect of general principles, in practice much will depend on the specific circumstances of the particular case.

266. The Tribunal notes that it is not obvious that paragraph 7 of Schedule 4 enables the Respondents to recover costs of these proceedings in any event. The contents of clause 7 relate to enforcement of breaches of covenant, forfeiture notices and other notices and make no reference to the legal or other costs of proceedings in respect of whether service charges or other sums are payable.

267. These proceedings do not identify fall within that description and so the Tribunal is inclined to the view that it does not enable the recovery of any of the costs of these proceedings. However, that preliminary view is held without the benefit of submissions and so the Tribunal does not consider it appropriate to express matters in definitive terms.

268. The section 20C and paragraph 5A applications are therefore potentially not relevant in that at first blush the Respondents would not be able to recover costs as service charges or as administration charges in any event, although the second of those might be less certain. Nevertheless, the Tribunal considers it appropriate to consider the applications.

269. The outcome of the proceedings is by no means the sole consideration. However, it is never irrelevant. The Applicants have achieved success in respect of the service charges and to that extent it is arguable that it was reasonable to apply. The Tribunal has been very critical of the manner in which the Service Charges and sums paid have been attended to by the 1st Respondent and to any extent that might be unclear, the Tribunal now makes it clear.

270. That said, the Applicants have failed in relation to much of the insurance charges, which was identified as the matter likely to involve the longest part of the hearing and to which certainly a considerable amount of effort was devoted. They have not done so in respect of all insurance charges but that said, they have done so notwithstanding significant failings in the approach taken by the 1st Respondent and the Applicants not having been far from success, and where it was understandable why the Applicant held real concerns. They have succeeded in respect of charges for insurance in 2021- 2022, save for a small sum for Ms Newland, and in respect of some of those for 2023- 2024.

271. The Tribunal is mindful that the Applicants have not dealt with matters with appropriate regard to the fact that there are two of them and the Service Charges and Insurance Rent demanded from each of them are not substantial year on year. That said, neither have the Respondents.

272. Taking matters overall the Tribunal considers it appropriate to move from any contractual entitlement to recovery that the Respondent may have to specifically disallowing 2/3s of the costs from being recovered as service charges or administration charges. Whilst the provisions are not expressed precisely the same for each, the Tribunal does not consider that has practical impact in this instance.

273. In terms of fees for the application, the Tribunal has determined that those should be borne by the Respondent. The reasoning as expressed above is relevant, save that the contractual position is not relevant, and there is no need to labour it. The added factor is that these were one-off fees and necessary for the Applicants to proceed at all and achieve the success that they did, which they achieved in a sufficiently significant measure.

Note

274. The Tribunal notes that the failings to comply with the Lease and with statutory requirements only prevent service charges being payable until such time as complied with. In principle it would be possible to comply. As for the effect on that of the change of membership and directorship of the 2nd Respondent is not a matter which the Tribunal needs to consider.

275. There will, the Tribunal considers, need to be an exercise undertaken to identify exactly what each Applicant (and in principle any other lessee) was obliged to pay applying these determinations and perhaps what they are obliged to pay if finalised and certified Service Charges for any given year are demanded. Hence, to whom any party involved owes any money. However, that is an exercise for the parties if they wish to embark on it and not for the Tribunal.

276. The Tribunal does not comment on the construction and anything which may be incomplete, although is particularly troubled, albeit amongst other matters, if fire safety has not been properly attended to. Any matters related to the construction may require determination in other fora and so the Tribunal has avoided comment about them.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case by email at rpsouthern@justice.ogv.uk

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28- day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.